Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

♦

O'RANE M. CORNISH, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

♦

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

♦

PETITION FOR A WRIT OF CERTIORARI

♦

O'Rane M. Cornish, SR.
Petitioner
Represents Himself
P. O. Box 5000
Oakdale, LA 71463-5000.

March 3, 2006

QUESTIONS PRESENTED

QUESTION 1:

Whether the unavailable 'municipal building permitting' documentary evidence, the only recognized objective, positive proof within the local municipality, of: (**a**) The construction and existence of any building; and (**b**) The existence of building construction projects; both pivotal, dispositive issues in this case, qualifies under the aegis of Rule 33 Newly Discovered evidence, given the uniquely peculiar, distinguishing circumstances and fact pattern of the Case.

QUESTION 2:

Whether as to the same case and same issue; (**a**) The District Court's Order overruling the previous decision of the Appellate Court, followed by, (**b**) The Appellate Court's decision affirming the District Court's Order; constitute violations of the settled doctrines of: (**1**) "The Law of the Case"; (**2**) "The Law of the Circuit"; (**3**) "The Mandate Rules"; and longstanding concepts of precedent; and so raises questions of reasonableness and fairness in general, and on the whole, evidences a violation of the Due Process Clause of the U.S. Constitution.

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There are two opinions of the United States Court of Appeals, and one decision of the United States District Court, whose publication status are unknown. The first, an Interlocutory Order of the USCA 6th Circuit, in Case 01-6132, filed September 27, 2001 (App. 5). The Court at Footnote 2 of the Order states, "Because these records were allegedly not available to him at trial and thus were not entered into evidence they would seem to be more applicable to a Motion for a New Trial based on newly discovered evidence under Rule 33, Fed. R. Crim. P...". By this ruling, the Court expressly and impliedly decided the status of the documents at issue as newly discovered evidence.

The second, is the third opinion of the United States Court of Appeals entered November 3, 2005, in which it affirmed the District Court's denial of the Rule 33 Motion II, (App. 7), in which the District Court effectively overruled the Appellate Court's September 27, 2001 [its previous] ruling. See Case No. 04-5869 (6th Cir. November 3, 2005).

The third, is the Order of the United States District Court of July 2004, (Appendix B), in which it denied the Rule 33 Motion II, even as it ruled that in the Court's opinion, the evidence filed by Cornish with the Motion is "newly available". This District Court decision, as noted, overrules the 6th Circuit's 9/27/01 ruling.

JURISDICTION

After the U.S. District Court denied the R-33 Motion II, Cornish timely filed Notice of Appeal to the U. S. Court of Appeals, Sixth Circuit. The Judgement of the Sixth Circuit was entered November 3, 2005. No petition for Rehearing was filed, Cornish's best efforts at same notwithstanding. The Jurisdiction of this Court is invoked pursuant to 28 USCA § 1254(1). A single Justice of this Court, by Letter Order dated February 10, 2006, in response to Cornish's timely Motion to extend time, extended the time to file his Writ for Certiorari, to March 3, 2006.

STATUTORY PROVISIONS

The following Federal Statutes and Rules are involved in this case:

U.S. Const. Amd. V, Due Process Clause, provides in relevant part: "No person shall be deprived of Life, liberty, or property without due process of law....;"

The Due Process Clause requires actions of government to occur through ordered and regularized process. The first of which is procedural due process.

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

The issue is whether the Rule 33, Fed. R. Crim. P. "Newly Discovered Evidence" stricture, is so absolute, that when confronted with a real world [documentary] circumstances of, in this instance, "municipal building permitting documents", specific to the two pivotal 'project addresses' in issue; which documents are ruled "newly available"; are "material" and "exculpatory" as to the pivotal "misrepresentation" and "false information" charges; that such 'tangible' documentary evidence cannot be seen as distinguished from the usual 'abstract' co-defendant-who-didn't-testify-at-trial-but-who-wants-to-testify-after-conviction type of evidence, and be accommodated under the 'newly discovered evidence' R-33 umbrella, as a basis for a new trial?

The pivotal issue element in this case, is the construction and existence of a building at a time and place as Cornish represented to Rosen/PFS; and the existence of the Alcor, Inc., 4730 Tchulahoma building construction project listed on the bank form.

The Municipal Building Permitting documents are unique because all building construction in the United States, are locally regulated and controlled, by the local municipality, through promulgated Ordinances, enforced by, in this instance, a local Agency designated as Construction Code Enforcement "CCE". This Agency's contemporaneous 'building permitting' documents, with their contemporaneously made notations, are, in the local City and County, the only objective positive proof/evidence, of the construction and existence of any building; and the existence of any 'building construction project'. The documents are to buildings and construction projects what a birth certificate is to the birth of a human being; or a death certificate to the death of a human being. They are conclusive.

Once again, do such documents, not available at trial, but located thereafter and filed with the Court, not afford dramatic distinctions between "tangible" municipal documentary evidence, whose substance although known at trial, the documents themselves hold such a traditional, legal and definitive role as to the construction and existence of buildings in local municipalities, such that they are

indispensable? Indeed, tax assessments on properties in municipalities are dependent on them [building permitting documents] as conclusive proof of construction and existence of buildings and construction projects; and "abstract" testimony of a convicted defendant as to his co-defendant? The rather peculiar circumstances exhibited all around, suggest that they ought to come under the R-33 umbrella. The District Court ruled the "fact pattern of the case is somewhat unique".

PECULIAR CIRCUMSTANCES — UNIQUE FACT PATTERN: A Sampler

Cornish was prosecuted in the U.S. District Court, Western District of Tennessee, for violation of 18 USCA § 1343 Wire Fraud — (Ct. 1) — misrepresentation of the construction and existence of a lite commercial building; 18 USCA § 1957 (Cts. 2-8) — money laundering [disbursement of the proceeds of Ct. 1]; 18 USCA § 1014 — false information (Ct. 9) — that listing of the "Alcor, Inc. building construction project" on the form to the FDIC insured bank was false, since, as they put it, "it never existed"; and 18 USCA § 1344 — bank fraud (Ct. 10) — deposit of the check retrieved from one of his company's mailboxes into one of his company's payroll accounts.

He went to trial without his corroborating business records and documents. But, the Court was noticed several times, of his missing business records and documents — prior to, during and after trial.

THE 4791-7 TCHULAHOMA BUILDING AT ISSUE:

Cornish, as the contractor, took the witness stand and testified as to what he did: that he obtained the proper Zoning permits, pulled the appropriate 'building permitting' documents, and that thereafter he undertook construction of the 4791-7 Tchulahoma building represented to Rosen/PFS.

THE "ALCOR, INC. 4730 TCHULAHOMA BUILDING PROJECT " AT ISSUE:

Cornish, as the contractor, also testified that he pulled the necessary 'building permitting' documents for the "Alcor, Inc., 4730 Tchulahoma Building Construction project" at issue, as listed on the form to the FDIC insured bank.

POISON PIT IN THE MIDST — WELL INTENTIONED PROJECT MADE BAD:

Cornish also testified, that the belated discovery of the "Poison Pit", an abandoned 'Superfund Hazardous Waste Disposal Site' in the same southwest quadrant of Shelby Drive and Tchulahoma Road as the 4791-7 Tchulahoma

building at issue, turned a good and well intentioned transaction bad.

EYEWITNESSES TO THE CONSTRUCTION OF THE BUILDING AT ISSUE:

Three eyewitnesses to the 4791-7 Tchulahoma building's construction testified for the defense: Leavette Robinson who testified that he lived across the street from the site of construction and that he saw from his backyard, Cornish's construction of the building, day to day, from start to finish, and that he visited and inspected it up close and personal after completion; Antonio Robinson (no relation to Leavette Robinson), testified that he too saw Cornish construct the building at Tchulahoma Road, that he visited the building, that it was well built with fine materials. And Mrs. Cornish, deceased spouse of Petitioner Cornish, who testified that she "saw Cornish place a brand new building on the empty lot, next to the church on Tchulahoma Road".

Cornish was convicted in the absence of the 'building permitting' documents displayed at Appendix C, and he was sentenced to a long term of imprisonment on 8/31/01.

RULE 33 MOTIONS FOR NEW TRIAL ARE FILED:

Cornish filed two Rule 33 Motions for New Trial. The first, Motion I, was premature, because it was filed prior to the belated discovery and retrieval of the seven boxes of documents and records at the home of deceased civil counsel's son in Nashville. During the pendency of Motion I, and the sentencing hearing, Cornish, at then place of confinement, received the seven boxes of documents from Nashville, Tennessee. Place of confinement denied his request to copy the documents so he could file a supplement. The Motion I was denied 8/31/01. In his Motion to Reconsider, he described the saga of the boxes and documents found in Nashville, and the place of confinement's denial of his request to copy. That Motion was denied. He then filed a timely appeal to the USCA, 6th Circuit, and simultaneously motioned the District Court for Stay of Execution of Sentence pending appeal, or Alternatively for an Order to Stay Transfer to another place of confinement pending his appeal. The motion was denied and Cornish appealed (an interlocutory) to the USCA, 6th Circuit.

The 6th Circuit Affirmed the decision. In so doing, it took note of the seven boxes of documents. It expressly or impliedly, placed them under the R-33 umbrella when it ruled:

> **"...They would seem to be more applicable to a motion for a new trial, based on newly discovered evidence under Rule 33, Fed. R. Crim. P..."**
>
> See Case 01-6132 (6th Cir. Sept. 27,2001).

This first appellate Ruling vis-a-vis the boxes of documents, placed them under the Rule 33 Newly Discovered Evidence. Cornish was promptly transferred without the boxes of documents to FCI-Texarkana, Texas. He was never again allowed to see the boxes of documents until 2003 when he was, by stroke of luck, transferred to the Desoto County Detention Center in Mississippi, May 10, 2003. The Sheriff promptly allowed delivery of the boxes.

RULE 33 MOTION II IS FILED:

With access to the seven boxes restored, he was allowed to copy the documents and he timely filed the second R-33 Motion II, on 9/3/03 with the copies. He also filed an Affidavit in Support, also with documents; an Amendment also with documents; and a Memorandum in Support of the Motion also with more documents. The District Court with a "successor" Judge presiding, denied the Motion II, ruling the evidence filed with the Motion "newly available", which precludes the grant of a New Trial. This

ruling (Appendix B) overruled the appellate Court's previous ruling (App. 5) of September 27, 2001.

UNIQUE DOCUMENTS — PECULIAR CIRCUMSTANCES:

Among the documents filed with the Motion II, are those displayed as follows and which appear at Appendix C hereto:

Fig. 1.3 Document Serial No: 737676
PROJECT STREET ADDRESS:
4791-7 Tchulahoma, Memphis
OWNER/TENANT: Mfg
(Manufacturing) Technologies

Fig. 1.2 Document Serial No. 737678
PROJECT STREET ADDRESS:
4791 Tchulahoma, Memphis

Fig. 1.1 Document Serial No: 737678
PROJECT STREET ADDRESS:
4791 Tchulahoma, Memphis

The foregoing three building permitting documents are material and exculpatory to the construction and existence of the 4791-7 Tchulahoma building at issue. They are "CCE" documents and were not available at trial.

Fig. 1.5 Document Serial No: 725310
PROJECT STREET ADDRESS:
4730 Tchulahoma, Memphis
OWNER/TENANT: Alcor, Inc.

Fig. 1.4 Document Serial No: 725310
PROJECT STREET ADDRESS:
4730 Tchulahoma, Memphis.

Exhibit #6 Document Serial No: 725310 —
Code Enforcement Inspection Report Card for Project 725310 at
PROJECT STREET ADDRESS:
4730 Tchulahoma, Memphis.

The foregoing three building permitting documents are material and exculpatory as to the existence of the "Alcor, Inc., 4730 Tchulahoma Road building construction project" listed on the bank form, and said to be a false listing. They are "CCE" documents and were not available at trial.

SECOND SET OF DOCUMENTS:

Fig. 2.1 Document Serial No: B0737688
PROJECT STREET ADDRESS:
3737 S Mendenhall, Memphis
OWNER/TENANT: Chitlin-N-Thangs

Fig. 2.2 Document: Envelope in which Code Enforcement sent the Certificate of Completion to Cornish after project completion and final inspection.

Fig. 2.3 Document Serial No: B0737688
'Certificate of Occupancy'
For PREMISES KNOWN AS:
3737 S Mendenhall
TENANT/OCCUPANT:
Chitlin-N-Thangs
CONTRACTOR: Six C Dahcor Industries, Inc.

The foregoing three documents are material to the issue of Cornish's company's capacity to pull commercial permits and to complete such projects. These are material and exculpatory as to the restaurant Cornish completed, which Austin said never was. They are "CCE" documents and were not available at trial.

THE " BUSINESS OFFICE " DOCUMENTS:

Fig. 3.1 Document Serial No: 725309
PROJECT STREET ADDRESS:
3383 Park Ave., Memphis
OWNER/TENANT: PCD

Fig. 3.2 Document Serial No: B0725309
PROJECT STREET ADDRESS:
3383 Park Ave., Memphis
OWNER/TENANT: PCD

Fig. 3.3 Document Serial No: 0725309 –
Letter Document from George Jett & Associates, Consulting Engineers dated July **12,** 1993;
ADDRESSED TO: Chief Building Inspector [CCE]
RE: Permit #00725309, 3383 Park Avenue
SUBJECT/ACTION: Certify to the Chief Building Inspector, Construction Code Enforcement, that the second floor Framing complied with the structural Integrity standards reflected in the drawings and the Standard Building Code. It is signed by George B. Jett, Professional Engineer, Tennessee #1476.

Fig. 3.4 Document Serial No: B072545

'Certificate of Occupancy'

For PREMISES KNOWN AS:

3383 Park Avenue, Memphis

TENANT/OCCUPANT: Personal & Career Development

OWNER: PCD

CONTRACTOR: Six C Dahcor Industries, Inc.

The foregoing four documents are material to the issue of Cornish's company's capacity to pull commercial permits and to complete such projects. These are material and exculpatory as to the business (commercial) permits Cornish pulled and completed, which Austin testified for the prosecution, "he was never allowed to complete". They are "CCE" documents and were not available at trial.

THE DEMISE OF THE BUILDING AT ISSUE:

Cornish testified in explanation, that the belated discovery of the "Poison Pit" in the same quadrant as the 4791-7 Tchulahoma building at issue, turned the good and well intentioned project and transaction bad. The following State documents were not available to him at trial:

Fig. 4.1 Document cover page case titled:
Commissioner's Order,
Case No: 91-3359.

Fig. 4.2 Page excerpt from the
Commissioner's Order describing
and identifying the specific
contaminants of the "Poison Pit".

Fig. 4.3 Letter Document from the General
Counsel, State of Tennessee,
Department of Environment and
Conservation [TDEC], informing in
the last line of the letter that,
"it was not filed in any Court".

Of the foregoing three documents, the first two are excerpted from the "TDEC", "Commissioner's Order" filed with his Motion II. The documents are material to the issue of Cornish's explanation as to the environmental impairment which destroyed the project's transaction's viability. No one wants to be living and/or working in close proximity to a "Poison Pit". All documents above are at Appendix C.

OTHER BUSINESS DOCUMENTS WERE ALSO FILED:

A series of other additional business documents filed with his Motion II, contradicts, impeaches and discredits the other prosecution witnesses. See as examples, Figs. 6, 7, 8, 9, 10, 11 at Appendix C. None of the witnesses the prosecution presented, ever visited and saw the building at issue — not even the FBI Agents. Indeed, one FBI Agent testified that "he wouldn't set foot on that property!".

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

1. INCONSISTENCY OF DECISION WITH PRIOR RULING OF APPELLATE COURT:

The decision of the District Court with respect to the Motion II is inconsistent with and contradicts the previous ruling of the Appellate Court filed September 27, 2001, in the same case (01-6132) and on the same issue. The inconsistency is direct and readily apparent. The Appellate Court ruled:

> **"Because the records were allegedly not available to him at trial and thus were not entered into evidence, they would seem to be more applicable to a motion for a New Trial based on 'Newly Discovered' evidence under Rule 33, Fed. R. Crim. P."**
> *USA v. CORNISH,* Case 01:6132 (9/27/01).

In its Denial Order of July 2004, the District Court ruled that the documents filed with his Motion II did not come under Rule 33 Newly Discovered evidence, but rather, were "Newly Available."

The U.S. Court of Appeals, Sixth Circuit, on 11/3/05, affirmed the decision of the District Court, and in so doing, condones or sanctions the District Court's overruling of its (USCA) previous 9/27/01 ruling. This runs afoul of two well-settled doctrines, "The Law of the Case" and the "Law of the Circuit", and ultimately, the concept of 'Precedent'. Review by this Court is necessary to restore the normal and usual order and functioning of the Courts.

2. SUBJECT MATTER OF SPECIAL INTEREST:

In municipalities across the United States, 'building construction' and construction 'building projects', are locally regulated via local laws called City/County Ordinances. The Ordinances are enforced by local police Agencies designated "Construction Code Enforcement" (CCE). They carry out their Code Enforcement duties via a series of received,

issued and archived documents and reports. Their contemporaneous documents and reports with their contemporaneously made notations are the only objective proof of a building's construction and existence in any municipality. They are relied on as a basis for local property tax assessments [that is to say, word of mouth that a building was constructed, is never accepted as a basis that a building has been constructed and in existence]. The documents are proof of what they state. This Court so ruled in the case of *USA v. McCOY,* 193 US 543, 24 S.Ct. 528, 48 L.Ed. 805., that:

> **"Official Reports and Certificates made contemporaneously with facts stated and in the regular course of official duty by an officer having personal knowledge of them, are admissible for the purpose of proving such facts".**

The municipal building permitting documents at issue in this case, falls under this well-settled ruling of this Supreme Court. Both of the lower Courts appear to have simply closed their eyes to the 'municipal building documents' presence, significance, nature and character vis-a-vis the charges against Cornish. The documents are pivotal, but are ignored. Indeed, not even mentioned except that the District Judge recited prosecution witness Austin of CCE that, "no one can undertake building the building at issue in the City and County, unless with building permitting documents through her". Those are the very building permitting documents that could not be located pre and for trial; discovered in Nashville after trial, retrieved

and filed with his Motion II, are declared "newly available" and thereafter simply ignored. See Appendix C, Fig. 1. And yet, they are the only objective, positive proof of the construction and existence of buildings, and the existence of building projects, not only in Memphis, but in municipalities all across the country.

Failing to recognize these documents accordingly, sets the type of precedent which bodes ill for municipalities, contractors, financial institutions, taxing authorities, mortgage companies, title and a host of other insurance companies, all of whom rely on the 'building permitting documents' traditional, historical and legal role, as the only objective, definitive proof of a building's construction and existence, and the existence of building construction projects. To now ignore them as to issues of building construction and project existence, is a precedent which would undermine an important industry and economic activity. Review by this Court is required to resolve the issues and preserve the status of local building permitting documents so far ignored. The potential impact from the precedential point of view, is much too significant for this Court to ignore.

3. RULING NOT JUST UNFAIR, BUT MANIFESTLY ERRONEOUS:

The ruling of the lower Courts ignoring the municipal building permitting documents, appears as not only unfair, but manifestly erroneous. The lower Courts' failure to consider the group of municipal building permitting documents so pivotal to element issues of this case is not just wrong but especially wrong. Consider: the prosecution presented only a single expert authority witness, Doris Lee Austin, Deputy Administrator, Memphis & Shelby County Office of Construction Code Enforcement, "CCE", who testified that these documents didn't exist [she had none, as she put it to the FBI Agent Burns], and that "she checked her records and found none". But, Fig. 1 at Appendix C shows the documents existed after all, issued by her very own office, even reflect mishandling by her office, since the 38118 zip code given was incorrectly encoded into her computer system as a 38116 zip.

These municipal building permitting documents are the product of the exercise of the legitimate police powers of local municipalities. **(1)** They are the only objective proof/evidence of the construction of any building within the municipality. **(2)** They are the only objective proof of the existence of building construction projects in the municipality. **(3)** They are the documents relied on by the property tax assessment authorities in the municipality to levy taxes. **(4)** They are the documents relied on to make

mortgage and insurance decisions. They stand as proof of what they state. The presumption must and is with them. Now, considering all that, it cannot be fair to simply ignore them [the documents] when filed with the Court, and the issue is whether or not a building was constructed in the municipality; and whether a building construction project existed. The documents are proof of those issues. Such is the role they play. Ignoring them as the lower Courts have done can only be wrong, and especially wrong; and calls for review by this Court.

3(a). SOLDIERS' RIGHTS, WHILE ON DUTY, MUST BE PROTECTED ON THE HOME FRONT

The manner in which these documents became not available to begin with, raises fairness issues then and now. Cornish, 27½ years a member of the United States Air Force, had to depart for a period of military duty in 1995. The civil lawsuit filed in the Chancery Court by the complainants and key prosecution witnesses in this case, was in progress. The issues in that case are the same as this case. While away on military duty, the Chancery Judge demanded these documents among several, and indeed had counsel contact Cornish's military unit regarding the matter. Cornish, following consultation with the Judge Advocate's office, invoking applicable provisions of the Soldier's and Sailor's Civil Relief Act of 1940 as Amded., petitioned the USDC for an Order directed to the Chancery Court to stay further action in that case until Cornish's release from his

tour of military duty. The Court denied the petition. The Chancellor ordered counsel to produce the documents. He then visited Cornish's office, and took all documents (7 boxes) leaving no copies. The civil suit was resolved. Counsel died before return of the documents.[1]

Five years later when Cornish was indicted in the case at bar, he had no idea as to the location of the boxes of documents. As it has turned out, the U.S. District Judge who denied the Petition pursuant to the Soldier's and Sailor's Civil Relief Act, resulting in the documents being taken in Cornish's absence for military duty, is this case's original trial judge. Rather ironic, but consider how things might have turned out had the petition been granted, Cornish returned home, and copied the documents in an orderly fashion and delivered them to his now deceased counsel. He would have had copies for trial, and with copies, the existence of the building, project and permitting documents, could not have been denied. The current matters thus started out unfairly, and degenerated into what is now before this Court, as especially wrong. A soldier's affairs are to be protected by the organs of the society whose business he is placed on military duty to faithfully undertake. That soldier, must now be allowed to correct the resulting miscarriage visited upon him, as a result.

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1. See Cornish v. Allisandratos, 96cv02177 (USDC March 1996), wherein Cornish invoked the Soldier's and Sailor's Civil Relief Act to stay proceedings until his release from his military duty. The Court denied. The documents were taken and he left without even copies. His attorney dies before there return, and as it developed, the son moved them to Nashville.

Consider: the documents ignored speaks rather loudly for themselves with respect to the contents they state therein. They are the only possibility or means to challenge the veracity and factual accuracy of the prosecution's lone expert authority and most damaging witness, Austin. One of the peculiar, if not unique features of the documents (App. C, Figs. 1, 2, 3, Exhibit #6), is that they are Austin's CCE agency's very own documents.

Austin testified (says) one thing, but 'her' documents say something which is the complete opposite of what she both informed the FBI Agent Burns, and testified to at trial. She said, the building could not and did not exist, because she had no building permitting documents, and that in the City and County, no one can build such a building except with these very documents from her. The documents contradict to the very core of what she testified, which just also happens to be the very premise and theory of the prosecution's case — indeed, the very heart of it. To now have the documents, and then simply ignore them and their impact on the case, appears wrong — very wrong, unfair, and manifestly erroneous. Without Austin, there is no evidence to support the prosecution's case against Cornish — indeed to support the conviction. More reason that it is manifestly erroneous for the courts to ignore them. The foregoing constitutes reasons for this Court to grant review.

CONCLUSION

Rule 33 — Newly Discovered Evidence, appears silent as to "newly available" evidence. As the Contractor, Cornish had to take to the witness stand to testify as to the substance of the municipal building permitting documents he pulled in the process of undertaking the construction of the building; and the building construction project. The documents are unique. They speak for themselves. No one can purport to speak for them. Rule-33's absolute stricture needs review and refinement to accommodate the unique documentary circumstances of this case. The Court should therefore grant review.

The inconsistency and conflict are readily apparent and direct. The September 27, 2001, previous ruling of the Appellate Court is overruled by the District Court; and what's more, the Appellate Court effectively affirmed that action of the District Court; all in contravention of "precedent," the "law of the case," and the "law of the circuit"; all of which dictates that this Court should grant review.

The Subject matter of this case as related to the central issue, the "municipal building permitting" documents, is of special interest; for if they can be ignored under these circumstances of the very issues and subjects that fall squarely within their domain exclusively [proof of the construction and existence of building, and existence of building construction projects], then, for example, taxing

authorities, and the multi-trillion-dollar mortgage market and industry could not be expected to rely on these documents anymore. That would be quite a disruption for the orderly conduct of economic activity across the United States. Property existence is inextricably linked and intertwined with property rights. This cries out for this Court's review.

Lastly, the rulings of the lower Courts are wholly unfair and manifestly erroneous given the documents involved, what they mean and do in the local communities, how they came to be lost to begin with, and their impact on a case in which the prosecution did not present any overwhelming evidence, indeed only a single authority witness. Review by this Court is demanded under the circumstances, magnitude, and consequences of the unfairness and manifest erroneousness readily evident.

Finally, in denying the R-33 Motion II, the District Court relied on a categorical absolute 'ban' on co-defendant's testimony, which was unavailable at trial, because the individual asserted his 5th Amendment rights. He supported his ruling with all cases of such circumstances. A survey of other Circuits' treatment of the R-33 issue, shows the majority regard the 'ban' on 'newly available' evidence — defined only in terms of unavailable co-defendant's testimony — as a kind of "straightforward bright-line" rule, which is anchored, as they all put it," in the plain meaning of Rule 33". But it appears that Rule 33 has not always been so strict or absolute, such that it precludes the "rare",

"peculiar" circumstances involving 'documentary evidence,' such as the instant circumstances which involve the rather unique, peculiar "municipal building permitting" documents.

Two cases in the 5th Circuit, *Newsom v. United States,* 311 F.2d 74,75 (5th Cir. 1962); and *Ledet v. United States,* 297 F.2d 737, 738 (5th Cir. 1962); appear as the rare exception, suggesting that Rule 33 has not always been so strict and absolute. The Court in both cases, attributed their rulings to the "peculiar circumstances" of the respective case. Both cases are dated 1962. The instant case, it is submitted, is another such rarity, given the unique municipal building permitting documents involved and the peculiar circumstances reflected. But this is 2006. This Court is requested to grant review.

Respectfully submitted,

O'Rane M. Cornish, Sr.
Petitioner.
Represents Himself.
P.O. Box 5000
Oakdale, LA 71463-5000.

APPENDIX A

9/24

The motion to stay execution presented to this senior judge is denied without prejudice. This file is sent forth with the the (sic) Court of Appeals in Cincinnati for consideration by an emergency motions panel.

/S/ Harry W. Wellford
HARRY W. WELLFORD
SENIOR CIRCUIT JUDGE

App. 2

Case. No. 01-6132

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

O'RANE M. CORNISH, SR.

Defendant - Appellant

BEFORE: HARRY W. WELLFORD, SENIOR CIRCUIT JUDGE.

Upon consideration of the pro se appellant's motion for a stay of execution of his sentence or in the alternative for an order requiring that the appellant not be transferred from his current place of confinement,

It is ORDERED that the motion be and it hereby is DENIED without prejudice.

ENTERED BY ORDER OF THE COURT

/S/Leonard Green
Leonard Green,Clerk

App. 3

01-6132

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
O'RANE M. CORNISH, SR.,	)	
	)	
Defendant-Appellant.	)	

Following a jury trial, the defendant was convicted and sentenced on charges of wire fraud, engaging in monetary transactions in property derived from unlawful activity, bank fraud, and making false statements on a loan application. He has appealed that conviction to this court. He has also filed a *pro se* motion seeking either an order staying execution of his sentence pending appeal or, in the alternative, an order directing that he be detained at his present place of incarceration (the West Tennessee Detention Center in Mason, Tennessee) pending completion of his appeal.[1]

---

1. The district court denied a motion to stay transfer in an order entered on September 12, 2001. The basis for that denial was the court's observation that it had "no authority to make decisions concerning his place of incarceration."

The defendant originally presented his motion to a Senior Judge of this court who referred it to the clerk in Cincinnati for assignment to the court as an emergency matter. Because the defendant believes his transfer to another facility is imminent, the motion has been referred to a single active judge of the court for expedited consideration. *See* Rule 27(c), Fed. R. App. P.

To establish entitlement to release pending appeal, a person found guilty of an offense and sentenced to a term of imprisonment must show 1) by clear and convincing evidence, that he is not likely to flee or pose a danger to the safety of another person or the community, and 2) that the appeal is not for delay and raises a substantial question of law or fact likely to result in reversal, an order for new trial, a sentence that does not include a term of imprisonment, or a sentence reduced to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process. 18 U.S.C. § 3143(b); *United States v. Pollard,* 778 F.2d 1177, 1181 (6th Cir. 1985). This statute creates a presumption against release pending appeal. *United States* v. *Vance,* 851 F.2d 166, 168-69 (6th Cir.), *cert. denied,* 488 U.S. 893 (1988).

The defendant's motion does not address any of the above considerations. He does not, for example, state what issues he seeks to raise on appeal. He does assert that he has received business records which were unavailable to him at trial, but he does not indicate how such records relate to the specific charges for which he was convicted or how they would help in his appeal.[2] In the alternative, the defendant seeks an order which would prevent prison authorities from transferring him to another facility. Under 18 U.S.C. § 3621(b), however, the Bureau of Prisons has the sole authority to designate an inmate's place of incarceration. *See United States* v. *Jalili,* 925 F.2d 889,892-93 (6th Cir. 1991). Although a sentencing court may recommend that a defendant be retained at a facility near the place of trial, *see* Rule 38(b), Fed. R. Crim. P., such a recommendation is discretionary and any such request should be directed initially to the sentencing court. *See Levine v. Willingham,* 261 F. Supp. 743, 746 (D. Kan. 1966).

---

2. Because these records were allegedly not available to him at trial and thus were not entered into evidence, they would seem to be more applicable to a motion for a new trial based on newly discovered evidence under Rule 33, Fed. R. Crim. P., rather than basis for attacking his conviction on direct appeal.

Even if this court had authority to act in this matter at this time, the materials presented by the defendant, without more, do not warrant an order preventing a transfer.[3]

It therefore is **ORDERED** that the motion for a stay of execution of sentence or, in the alternative, an order preventing his transfer to another facility is denied.

ENTERED BY ORDER OF THE COURT

/S/ Leonard Green
Clerk

---

3. We also note that such requests are usually based upon a need to confer with appellate counsel. In this case: the defendant has chosen to proceed on appeal pro se and that need is not a factor. Although he claims a need to have access to his business records, it does not appear that a transfer would necessarily foreclose such accessibility.

App. 7

No. 04-5869

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
O'RANE M. CORNISH, SR.,	)	
	)	
Defendant-Appellant.	)	

Before: SILER, CLAY, and ROGERS, Circuit Judges.

O'Rane M. Cornish, Sr., appeals a district court order that denied his motion for a new trial filed under Fed. R. Crim. P. 33. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Following a jury trial in the district court in 2001, Cornish was convicted of wire fraud, seven counts of money laundering, bank fraud, and making a false statement on a loan application in violation of 18 U.S.C. §§ 1343, 1957, 1334 & 1014. Prior to sentencing, Cornish filed an initial Fed. R. Crim. P. 33 motion for a new trial by counsel, citing records favorable to the defense that could not be retrieved

prior to trial. Over six months later, the district court denied Cornish's motion for a new trial because Cornish did not provide exculpatory records in support of his motion. Contemporaneously, the district court sentenced Cornish to 71 months of imprisonment, to be followed by three years of supervised release, and imposed a $550 special assessment and ordered Cornish to pay $427,190.68 restitution. Cornish filed a timely notice of appeal taken from his judgment of conviction and from the district court's order denying his initial motion for a new trial. This court affirmed Cornish's convictions and the district court's order denying his motion for a new trial. *United States* v. *Cornish,* No. 01-6132,2003 WL 21376949 (6th Cir. June 12,2003).

Next, Cornish filed the instant Fed. R. Crim. P. 33 motion for a new trial, again alleging as grounds for relief newly discovered and retrieved exculpatory evidence. Ultimately, the district court denied Cornish's motion for a new trial. Cornish filed a timely notice of appeal.

On appeal, Cornish reiterates his contention that new evidence warrants a new trial, and contends for the first time that his sentence under the United States Sentencing Guidelines was improper. The government responds that the district court did not abuse its discretion in denying Cornish's motion because the cited evidence is "newly available" as opposed to "newly discovered," and because the evidence does not warrant a new trial in any event. Upon review, we affirm the judgment essentially for the reasons stated by the district court in its order denying defendant's motion for new trial filed July 1, 2004.

Generally, this court reviews the denial of a Fed. R. Crim. P. 33 motion only for an abuse of discretion. *United States* v. *Hawkins*, 969 F.2d 169, 175 (6th Cir. 1992); *United States* v. *Seago*, 930 F.2d 482, 488 (6th Cir. 1991). Here, Cornish's motion for a new trial is cognizable only on the basis of newly discovered evidence because it was filed more than seven days after the verdict. However, motions for a new trial under Fed. R. Crim. P. 33 based upon newly discovered evidence are disfavored. *Hawkins*, 969 F.2d at 175 (citing *United States* v. *O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986)). Defendant bears the burden of demonstrating the need for a new trial, and such motions will be granted only sparingly. *Hawkins*, 969 F.2d at 174; *Seago*, 930 F.2d at 488. A motion for a new trial based upon newly discovered evidence should be granted only where: (1) the new evidence was discovered after trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material; and (4) the evidence would likely produce an acquittal. *Id.* Evidence which is known to a defendant before trial but was not available at trial is not "newly discovered" and does not warrant a new trial. *See United States v. Turns, 198 F3d 584, 586-88 (6th Cir. 2000); United States v. Glover*, 21 F.3d 133, 138-39 (6th Cir. 1994). In this case, the district court did not abuse its discretion in denying defendant's motion.

First, the district court correctly concluded that Cornish's documentary evidence in support of his motion for a new trial is "newly-available" as opposed to "newly discovered." Accordingly, the district court was within its discretion to deny Cornish's motion for a new trial on this basis alone. Nonetheless, the district court correctly

concluded that Cornish's evidence does not warrant a new trial in any event. Accordingly, the district court did not abuse its discretion in denying defendant's Fed. R. Crim. P. 33 motion on this ground.

Finally, it is noted that any Sixth Amendment sentencing claim Cornish might have is not properly before this court because Cornish did not raise the claim in the district court. *See United States v. Ninety-Three* (93) *Firearms,* 330 F.3d 414, 424 (6th Cir. 2003). Moreover, any Sixth Amendment claim regarding judicial factfinding and application of the United States Sentencing Guidelines under *United States v. Booker,* 125 S. Ct. 738 (2005), is precluded because *Booker* does not apply retroactively to cases on collateral review. *See Humphress v. United States,* 398 F.3d 855, 860 (6th Cir. 2005), *cert. denied,* 74 U.S.L.W. 3207 (U.S. Oct. 3, 2005) (No. 05-5130). Accordingly, Cornish's remaining claim on appeal is meritless.

For the foregoing reasons, the district court's judgment is affirmed. *See* Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/S/ Leonard Green
Clerk

APPENDIX B

DISTRICT COURT ORDER
OF JULY 2004,
NOT AVAILABLE TO CORNISH
AT PRINTING

APPENDIX C

THE "NEWLY AVAILABLE" MUNICIPAL BUILDING PERMITTING DOCUMENTS

App. 12

TALE OF THE NON-EXISTENT BUILDING PERMITS FOR 4730 & 4791-7 TCHULAHOMA RD., MEMPHIS 38118

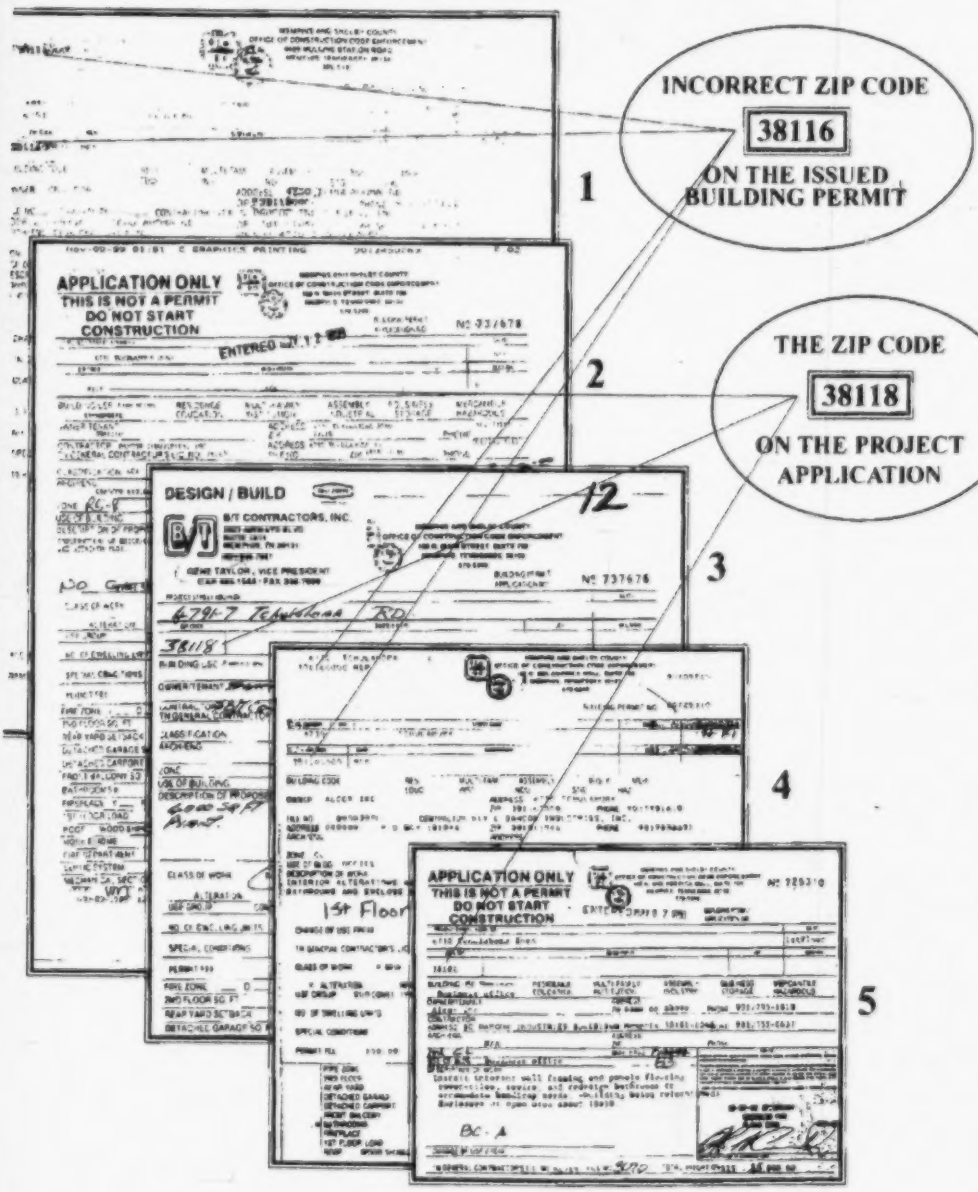


FIG. 1

SUMMARY OF Fig. 1 DOCUMENTS PRESENTATION

Fig. 1 graphically presents the documents witnesses Doris Austin, Deputy Administrator, Memphis & Shelby County Office of Construction Code Enforcement (Code Enforcement), and Brian Burns, FBI, testified didn't exist. There nonexistence, they reasoned and testified, meant that the building at issue could not exist, and that information supplied to the bank was false.

Documents **1, 2, 3** are Applications and Permits for 4791-7 Tchulahoma Road, the building project at issue. **4** and **5** are the Application and Permit for 4730 Tchulahoma Road, which goes to the core of the false information element. THEY WEREN'T AVAILABLE FOR TRIAL:

These five documents at **Fig.1**, exhibit a unique feature which proved to be severely prejudicial to Cornish pre and at trial. Documents **2** and **3** shows the correct address with zip code **38118**. But, Document **1**, show the Permit issued with an incorrect zip code **38116**. The incorrect zip code (38116), prevented access by Code Enforcement itself to the documents, kept Cornish from accessing them, and also the FBI's Brian Burns from access as reflected in his testimony at **RT Vol.IIp252:L7-11; APX ____**. When asked about the existence of permits for Alco[r] at 4730 Tchulahoma Road, Austin, he testified, told him she had none. But, as the documents **4** and **5** shows, the address with the correct zip code 38118 was provided, but Code Enforcement again issued the Permit to the wrong zip code, as shown by Document **4** - the Permit.

The documents arrayed in diffused relational sequence at **Fig. 1**, are among the permit applications, permits and Certificates of Occupancy which have been ruled "newly available" evidence by the U.S. District Court. They disprove the very premise of the prosecution's case and the testimony of its 'ace' witnesses, Austin and Burns. They corroborate defense witnesses Leavette Robinson, Antonio Robinson and others, all eyewitnesses to the construction.

BEST AVAILABLE COPY

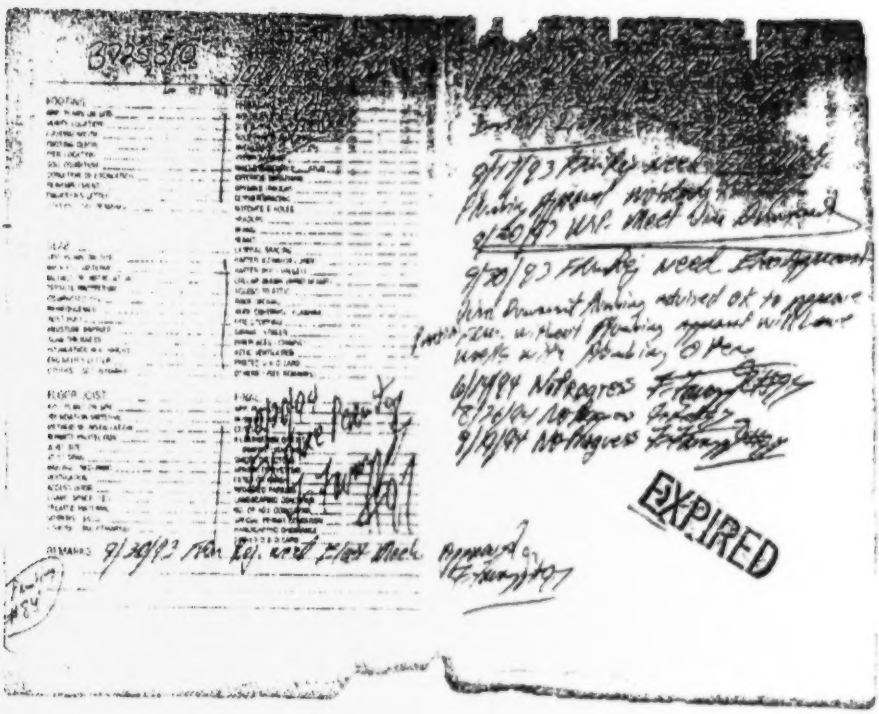


Exhibit #6

"HE WAS NOT ALLOWED TO COMPLETE COMMERCIAL PROJECTS", SAID AUSTIN - FALSELY.

PROSECUTION WITNESS: DORIS AUSTIN ON DIRECT TESTIFIED: RT.Vol.Ip154:L9-15:

. . . . .

Q: Was he allowed to in fact complete those because of his license?

A: No.

Q: So of the four commercial permits he applied for, he was not all allowed to complete any of them; is that correct?

A: No.

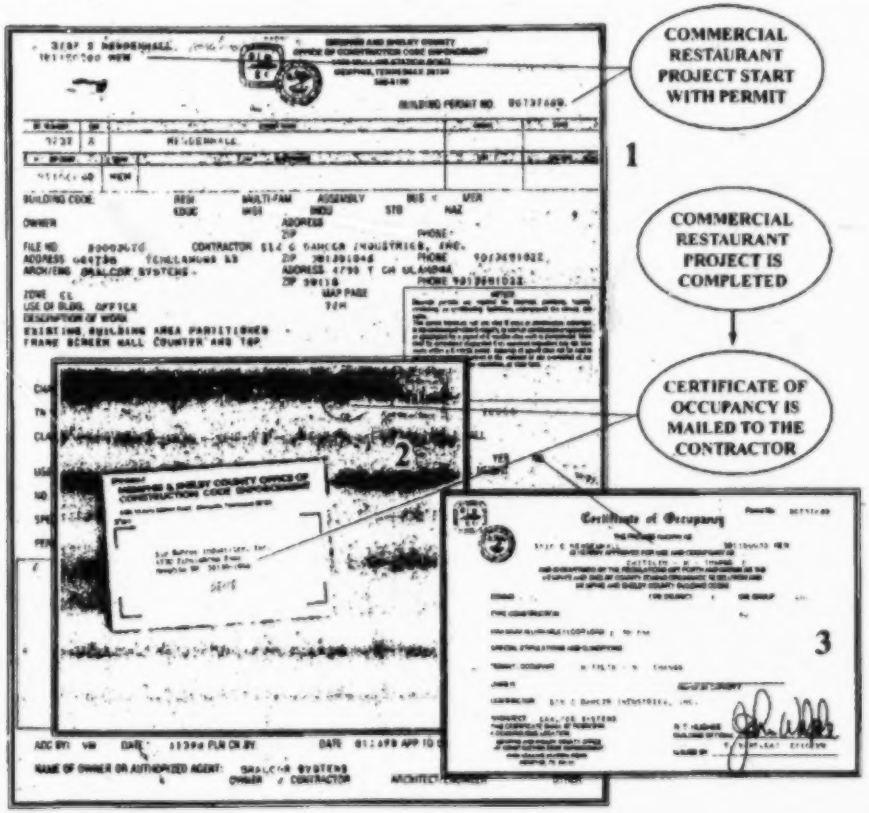


FIG. 2

THESE TWO (FIG. 2 & FIG. 3) "NEWLY AVAILABLE" SERIES OF DOCUMENTS DISPROVES AUSTIN'S TESTIMONY. THEY, ONE A RESTAURANT, THE OTHER AN OFFICE, SHOW PERMI APPLICATIONS, INSPECTION AND CERTIFICATES OF OCCUPANCY. IN MEMPHIS, TN., THE CERTIFICATE OF OCCUPANCY IS CONCLUSIVE PROOF OF SUCCESSFUL COMPLETION OF THE PROJECT(S) FOR WHICH THE PERMITS WERE PULLED. THEY SHOW THAT CORNISH COMPLETED HIS PROJECTS FOR WHICH HE PULLED BUILDING PERMITS. AUSTIN TESTI FIED FALSLEY.

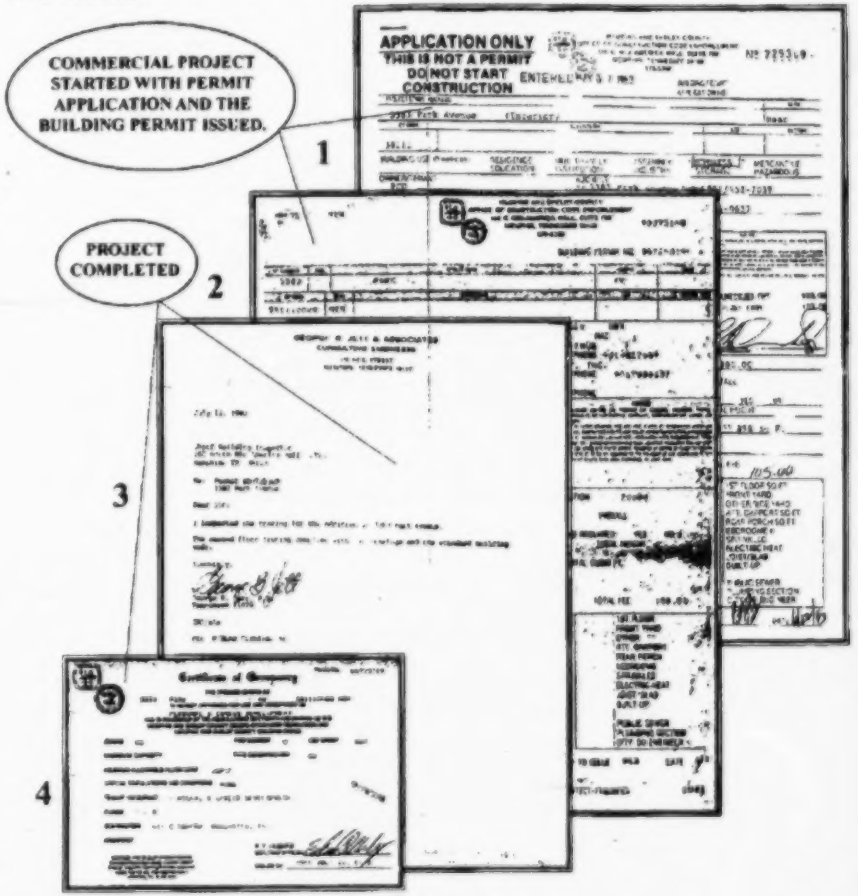
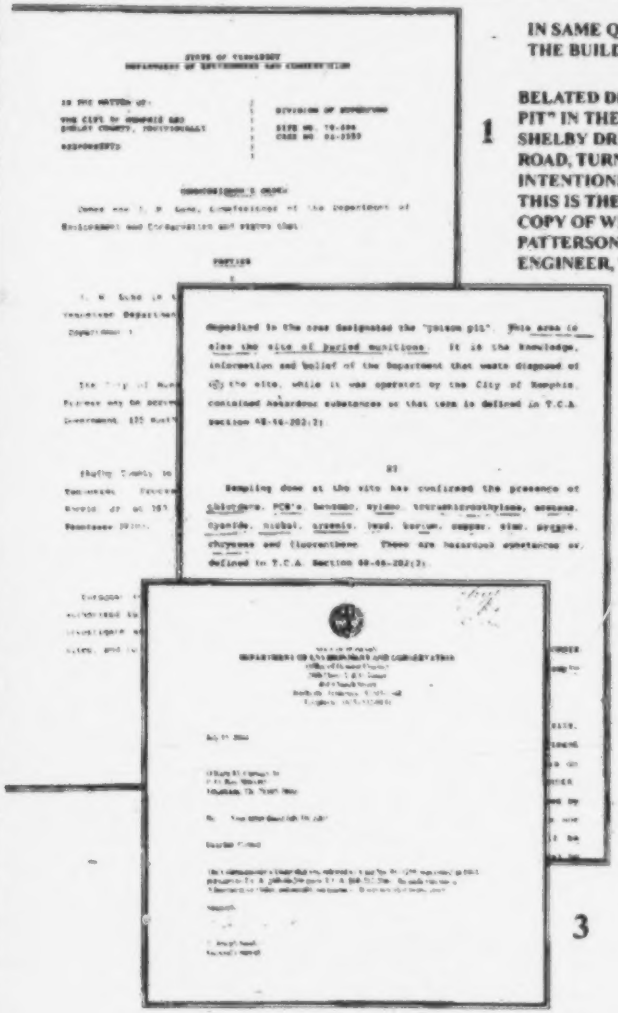


FIG. 3

UNKNOWN ENVIRONMENTAL IMPAIRMENT - "POISON PIT" IN THE MIDST



IN SAME QUADRANT AS THE BUILDING AT ISSUE.

1 BELATED DISCOVERY OF THIS "POISON PIT" IN THE SOUTHWEST QUADRANT OF SHELBY DRIVE AND TCHULAHOMA ROAD, TURNED A GOOD AND WELL INTENTIONED BUILDING PROJECT BAD. THIS IS THE "COMMISSIONER'S ORDER", COPY OF WHICH HE RECEIVED FROM PATTERSON, THE CITY ENVIRONMENTAL ENGINEER, WHEN HE VISITED HIS OFFICE AFTER BEING INFORMED OF THE PROBLEM BY HIS CUSTOMER, MTC. HE IMMEDIATELY DELIVERED THIS COPY TO HIS COUNSEL, CHARLES DICKINSON, DECEASED.

2

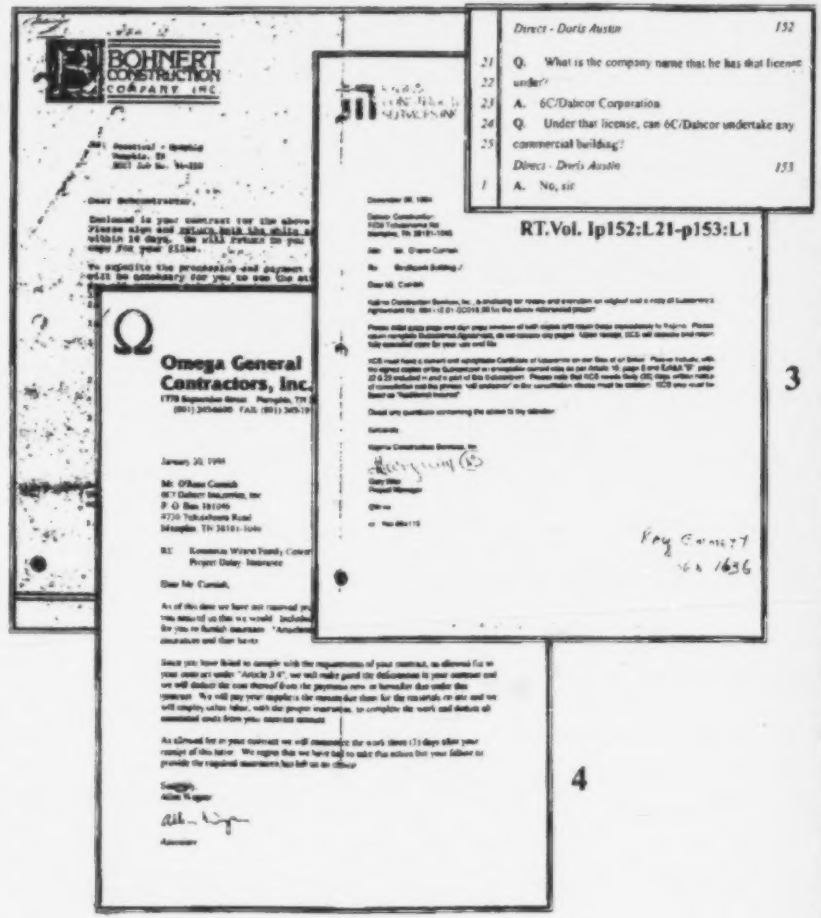
CORNISH'S COPY OF THIS "ORDER" IS AMONG THE "NEWLY AVAILABLE" EVIDENCE. BUT HE COULDN'T WITH DILIGENCE GET A COPY FROM OTHER SOURCES IN THE MEMPHIS / SHELBY COUNTY AREA, BECAUSE, AS SHOWN BY THIS LETTER FROM THE GENERAL COUNSEL, IT WAS NOT FILED IN ANY COURT.

3

FIG. 4

HE COULD DO NO COMMERCIAL CONSTRUCTION, TESTIFIED DORIS AUSTIN

THESE ARE JUST THREE OF THE COMMERCIAL CONSTRUCTION UNDERTAKEN BY CORNISH AND HIS COMPANY. THEY DISPROVE AUSTIN'S TESTIMONY IN ABSOLUTE TERMS.



2

Direct - Doris Austin 152

21 Q. What is the company name that he has that license under?
22 A. 6C/Dalcor Corporation.
23 Q. Under that license, can 6C/Dalcor undertake any
24 commercial building?
25

Direct - Doris Austin 153

1 A. No, sir.

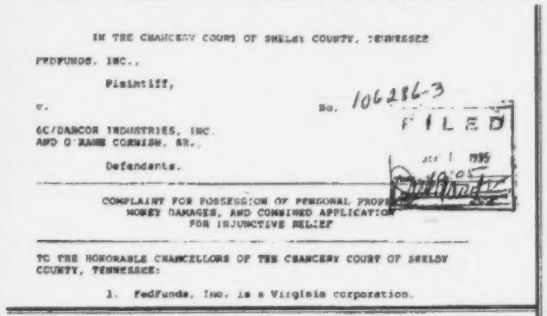
RT.Vol. Ip152:L21-p153:L1

3

4

FIG. 5

A DISPLAY OF A SERIES OF LIES AND DECEPTION BY PROSECUTION WITNESS BEALE: FIRST HE LIES AND DECEIVES THE CHANCERY COURT.



IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

FEDFUNDS, INC.,

Plaintiff,

v. No. 106286-3

FILED

6C/DANCOR INDUSTRIES, INC. AND O'KANE CORNISH, SR.,

Defendants.

COMPLAINT FOR POSSESSION OF PERSONAL PROPERTY, MONEY DAMAGES, AND COMBINED APPLICATION FOR INJUNCTIVE RELIEF

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE:

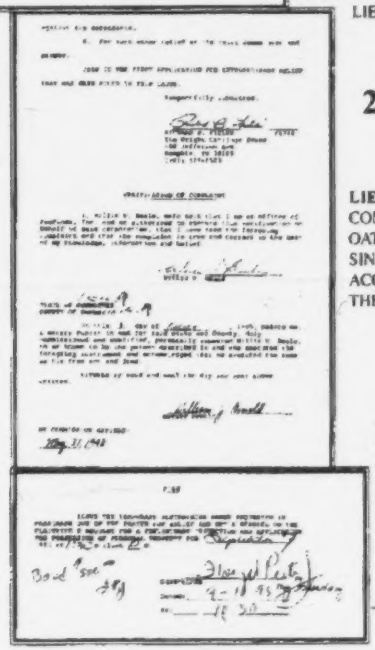
1. FedFunds, Inc. is a Virginia corporation.

NOTE SWORN VERIFICATION BELOW.

1

LIE #1
BEALE, A PROSECUTION ACE WITNESS LIED IN HIS VERY FIRST AVERMENT TO THE CHANCERY COURT

RULE: LIE TO ONE COURT; LIE TO ALL COURTS.



2

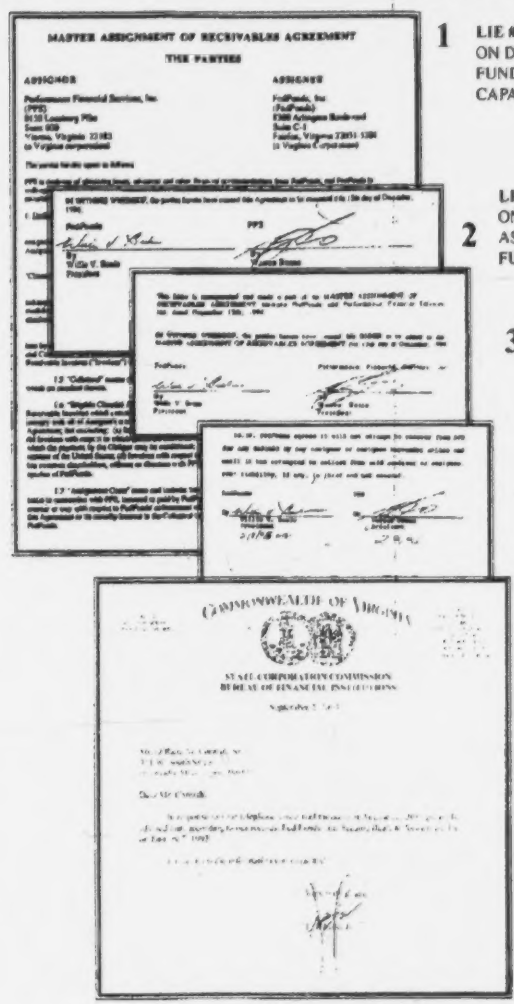
LIE #2
COMPLAINT VERIFICATION IS UNDER OATH. BUT, IT IS A LIE UNDER OATH, SINCE HIS FIRST AVERMENT IS A LIE ACCORCING TO THE RECORDS OF THE COMMONWEALTH OF VIRGINIA

THE DECEPTION:
BEALE'S LIE GAVE HIM WHAT HE SOUGHT - THE TEMPORARY RESTRAINING ORDER. IT IS OBTAINED BY OUTRIGHT DECEPTION.

3

FIG. 6

PRESENTATION OF THIS DOCUMENT TO THE TRIERS OF FACT, LIES AND MORE LIES; BECAUSE PARTY OF 2ND PART, FED FUNDS, INC., DID NOT EXIST AT IT'S INCEPTION.



MASTER ASSIGNMENT OF RECEIVABLES AGREEMENT

THE PARTIES

ASSIGNOR

ASSIGNEE

1

LIE #3
ON DATE OF THE TRANSACTION AT ISSUE, FED FUNDS, INC. DIDN'T EXIST, OR POSSESSED CAPACITY TO ENTER CONTRACTS, ETC.

2

LIE #4
ON DATE OF EXECUTION OF THE MASTER ASSIGNMENT AGREEMENT, 12/13/94, FED FUNDS, INC. DIDN'T EXIST.

3

4

LIE #5
ON DATE OF THE 2ND EXECUTION OF THE MASTER ASSIGNMENT AGREEMENT, 2/8-9/95, FED FUNDS, INC. DID NOT EXIST AS AT JANUARY 7, 1993

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION
BUREAU OF FINANCIAL INSTITUTIONS

CONFIRMATION
LETTER FROM THE COMMONWEALTH OF VIRGINIA CONFIRM THAT AS AT 1/7/93, FED FUNDS, INC. DID NOT EXIST.

5

FIG. 7

App. 20

THE LYING CONTINUES BUT AT THE DISTRICT COURT

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION
BUREAU OF FINANCIAL INSTITUTIONS

August 11, 2003

Mr. O'Rane M. Cornish, Sr.
214 W. South Street
Hernando, Mississippi 38632

Dear Mr. Cornish:

I have your letter dated July 28, 2003 and received August about two firms supposedly operating or having operated in Vir Financial Services, Inc. and Fed Funds, Inc.

My staff has checked our records and I offer the following Financial Services, Inc. was formerly registered as a business in V defunct. The company listed its address as 9150 Leesburg Pike, Virginia 22812. Its registered agent was J. Michael Slocum, 6225 Brandon Avenue, Suite 310, Springfield, Virginia 22150. The President of the company was Mr. Warren J Rosen.

Second, Fed Funds, Inc. was registered as a business in Virginia, but apparently changed its name to Beale and Associates, 6011 Malta Lane, McLean, Virginia 22101 Its registered agent and President is Willis V. Beale, of the same address.

Neither of these companies have ever been chartered or licensed as a banking institution by the State Corporation Commission, Commonwealth of Virginia.

I hope this is helpful.

Very truly yours,

LIE #6
COMPARE HIS DIRECT TESTIMONY AT **RT Vol.Ip91:L24-25 INSERTED, WITH** LETTER FROM COMMONWEALTH OF VIRGINIA

91

Direct - Willis Beale

Willis Beale,

20 A. I was the president of Fed Funds
21 Q. Tell us what Fed Funds does.
22 A. Fed Funds was a company that was established to
23 finance companies that were involved in the factoring
24 business. In the simplest form we were basically a
25 bank.

2

HIS TESTIMONY THAT FED FUNDS WAS A BANK IS FALSE. HE LIED.

3

FIG. 8

App. 21

WARREN ROSEN IS BEALE'S PARTNER AND AN ACE PROSECUTION WITNESS. HE MORPHED INTO THINGS HE WAS NOT, WITH CAPABILITIES HE NEVER POSSESSED, AFTER HE FOUND OUT MUCH ABOUT CORNISH AND HIS COMPANY FROM #4 & 5 DOCUMENTS BELOW.

Cross - Warren Rosen

5 Q. Isn't it true that Mr. Schaner had told you that
6 Mr. Cornish didn't want to deal with any brokers?
7 A. I don't recall that he said that.

1

HE DENIED RECOLLECTION OF COMMUNICATION ABOUT CORNISH'S AVERSION TO BROKERS.

FAX COVER SHEET
From
DEAL CONSULTANTS
112 ENGLISH ROSES COURT
STONE MOUNTAIN, GEORGIA 30088 USA
404-440-9849 FAX 404-939-9395

TO: Performance Financial Services, Inc.
ATTN: Tyler Fielding
NUMBER OF PAGES: 3 (including this cover page)
FROM: Ed Schaner
RE: DEH GC/Delmore
DATE: 6-28-95

Here is the information I have on this client. This can also not work through a broker arrangement, but I think that he can be a good client for you. He is currently bidding on a VA project.

I am not going to be able to get on my normal capacity as owner with the client, so for us there must be ten up.

Thank you.

Edward Schaner

4

WITH 4 & 5 HE MORPHED INTO THINGS HE WAS NOT WITH CAPABILITIES HE NEVER HAD IN THIS LETTER TO CORNISH.

FAX COVER SHEET
From
ATLANTA FUNDING CORPORATION
3340 Peachtree Road, The Towers, Suite 1800
Atlanta, Georgia 30326
404-953-1599 FAX 404-498 9401

TO: GAC
ATTN: Mike Freund
NUMBER OF PAGES: 7 (including this cover page)
FROM: Ed Schaner
RE: GC/Delmore Industries, Inc
DATE 2-2-95

Here is the FAX on the construction company in Memphis that I was talking to you about the other day. They have been burned by a couple of bad brokers and are really gun shy.

Thank you.

Ed Schaner

5

Performance Financial Services, Inc.

6

THE LETTER FROMTHE USDOC SHOWS ROSEN TO HAVE LIED REPEATEDLY TO CORNISH IN HIS LETTER. SHOW HIM A FAKER.

Rec'd 8/4/03

July 30, 2003

O'Rane M. Cornish, Sr.
214 W. South Street
Hernando, MS 38632

Dear Sir:

We received your request for the verification/confirmation and information regarding Performance Financial Services. Note that all requests for documents must be handled under the Freedom of Information Act (FOIA). You may obtain information at http://www.doc.gov/ocpa/FOIA/foiaer.htm. Nevertheless, given the agency's effort in lieu of ongoing services to the public, the Minority Business Development Agency (MBDA) conducted a quick review of its files in order to respond to your request.

The letter confirms that we were unable to locate the execution of a cooperative working agreement between MBDA of the U.S. Department of Commerce and Performance Financial Services, Inc. dated February 14th or at any other time.

Sincerely,

Monica Eaton
Chief Counsel
Minority Business Development Agency
U.S. Department of Commerce

7

FIG. 9

THOSE WHO BRAZENLY RESORT TO DECEPTION, ALSO ALTER DOCUMENTS. ROSEN PROVIDED THE DOCUMENT 8(A) BELOW - WITH CORNISH'S DISCLOSURE DELETED! THE "NEWLY AVAILABLE" DOCUMENT (8) SHOWS THE DISCLOSURE AS CORNISH ORIGINALLY PROVIDED ROSEN.

1

Direct - Warren Rosen

BUT AL TOWNSEND IS NOT SAME AS: A.S. TOWNSEND

Q. Was this again attested to purportedly by some secretary of the corporation?
A. Yes, again, the same signature of Al Townsend
Q. Al Townsend.
-MR. DISCENZA: IF Your Honor please, I would ask this be marked and moved into evidence as the government's exhibit.

8

IN WITNESS WHEREOF, this Guaranty has been duly sealed, executed and delivered by the undersigned this 23 day of April, 1991.

AC/Dahcor Industries, Inc.
A Tennessee Corporation
(CORPORATE SEAL)
BY:
NAME: O'Bane M. Cornish, Sr.
TITLE: Chief Operations Officer
ATTEST:
(Assistant) Secretary

BY:
NAME: O'Bane M. Cornish, Sr.
Individually

SUBSCRIBED and SWORN to before me this 23rd day of April, 1991.
Notary Public
Comm Exp 7-13-93

Page 3 of 3

Dear Sue: I am positive I told Tonda you that I had received those funds and the file [illegible] Sue Gore, Comptroller Dept. 1st Tenn. Bank Box 1707 [illegible] Memphis, TN 38101 Re: Account #[illegible] Regulatory Environmental Consultants with [illegible] Regulatory Environmental Consultants, Inc. Please fix [illegible] Thank you and let me know if I need to do anything else. Thanks for your help. Sincerely, Bane

- THE DOCUMENT ROSEN PRESENTED THE COURT

8(A)

IN WITNESS WHEREOF, this Guaranty has been duly sealed, executed and delivered by the undersigned this 23 day of April, 1991.

AC/Dahcor Industries, Inc.
A Tennessee Corporation
(CORPORATE SEAL)
BY:
NAME: O'Bane M. Cornish, Sr.
TITLE: Chief Operations Officer
ATTEST:
(Assistant) Secretary

BY:
NAME: O'Bane M. Cornish, Sr.
Individually

SUBSCRIBED and SWORN to before me this 23rd day of April, 1991.
Notary Public
Comm Exp 7-13-93

ROSEN IS ASKED IF CORNISH TOLD HIM THAT HE (CORNISH) HAD WORKED WITH AND FOR MTC BEFORE. HE TESTIFIED "NO" BUT THE "NEWLY AVAILABLE" DOCUMENT ABOVE SHOWS THAT HE WAS SO INFORMED IN WRITING. BUT, IT IS DELETED FROM 8(A) DOCUMENT AT LEFT.

Cross - Warren Rosen

2

Q. Did Mr. Cornish tell you that he had worked for Manufacturing Technologies for a number of years?
A. No.
Q. He had done work for them before?
A. No, he did not.

FIG. 10

IT IS NOT ONLY ROSEN, BEALE, AUSTIN AND BURNS WHO, AS THE FOREGOING SHOWS, TESTIFIED FALSELY; WILLIAM SCOTT VAUGHT ALSO TESTIFIED FALSELY/MISTAKENLY AS THE DOCUMENTS BELOW REVEAL. THEY ALSO CORROBORATE CORNISH'S DISCLOSURE

1

SECOND NOTICE

Mr. O'Bane M. Cornish
Suite 101, 3595 Regal Blvd.
Memphis, Tennessee 38118

Re: Suite No. 101
3595 Regal Blvd.

Dear Cornish:

My records indicate that the rent on 100 share Acetic Acid Incorporated is delinquent for the following period: August 1986.

The second check for the said dues in the sum of which is still outstanding.

The amount due is $187.50. As per the rent clause under the paragraph 18 of your lease agreement that "...the lessee shall be in violation of declaring this lease terminated and have the right to collect from the lessee the entire unpaid balance for the remainder of the term."

Sincerely,

J. Edward Vaught, II

JEV:lll:km

cc: Mr. C. J. Vaught, President, Great Southern Corporation

2

Mr. O'Bane M. Cornish
Suite 101
3595 Regal Boulevard
Memphis, Tennessee 38118

Re: Suite No. 101, 3595 Regal Boulevard

Dear Mr. Cornish:

My records reflect that in spite of the fact that repeated attempts have been made to rectify this account brought up to date, the rent on the above mentioned property is delinquent for the two months of October and November 1986.

In the event you cannot find means to rectify this matter without the payment of rent, the total rent and interest due as of 5 May 1987 will be in the amount of $950.00 as established on the enclosure. In that event tenancy will be changed so that amount plus other back charges as court costs, attorney's fees and interest's fees. Deadline to be reached must make every effort to effect such damages wherever possible.

In the meantime inasmuch as the premises have not been vacated to a period of two months, your personal property will be seized at that time in order that an attempt to lease elsewhere may be made.

Sincerely,

J. Edward Vaught, II

JEV:lll:km
Enclosure

cc: Mr. C. J. Vaught, President, Great Southern Corporation
Mr. Cornish, 4784 Airline, Memphis, Tennessee 38118
Mr. Cornish, P. O. Box 24243, Memphis, Tennessee 38124-0243

(over)

FALSITY THE COURT RELIED ON:
William Scott Vaught testified that he conducted business as Great Southern Corporation at **3595 Regal** in Memphis; that he had been at that location since **1973**; had never heard of Cornish, his company and his customer, MTC.

a) These two documents are dated 26 August **1986** and 17 November **1986**.
b) They are addressed to Cornish.
c) They refer to and are about the lease for **3595 Regal** [Boulevard], Memphis.
d) They both show that copy of each was sent to **Mr. C. J. Vaught, President, Great Southern Corporation.**
e) Both these documents corroborate the **Fig. 10** document on the opposite page hereto, which shows Cornish's penned **notice** to Rosen/PFS as to his previous relations with his customer, MTC. If Cornish had these documents at trial, would the testimony of William Scott Vaught have been impeached? It would. Now, that they are "newly available", they disprove his testimony.

FIG. 11

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
06-399 MAR 6 - 2006
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

O'RANE M. CORNISH, SR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENT TO WRIT ADDING AT APPX. B, DISTRICT COURT JULY 2004 ORDER WHICH WAS NOT AVAILABLE AT ORIGINAL PRINTING AND FILING.

O'Rane M. Cornish, SR.
Petitioner
Represents Himself
3804 Shadyhollow Lane,
Memphis, TN 38116-4039.

July 12, 2006

This Supplement to the Writ of Certiorari, is filed pursuant to the Order of this Court, to add the July 2004 Order of the United States District Court, which was not available to Cornish at the original printing of the Writ. This Court attached a copy of that District Court Order to its letter Order requiring this supplement to be filed within sixty days. The District Court Order is at Appendix B, App. 11.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. No. 00-20056 B

O'RANE M. CORNISH, SR,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIALAND DENYING REMAINING PENDING MOTIONS

Before the court is the motion of the pro se defendant, O'Rane M. Cornish, Sr., for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, which provides in pertinent part that "the court may vacate any judgement and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A determination of whether a new trial is warranted lies within the sound discretion of the trial court. United States v. Monus, 356 F.3d 714, 716 (6th Cir. 2004), reh'g en banc denied (Mar. 15, 2004). The Sixth Circuit utilizes a four-part test in ruling on the appropriateness of a new trial: (1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the new evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal if the case were to be retried. United States v. Dupree, 323 F.3d 480,488 (6th Cir. 2003)(citing United States v. Glover, 21

F.3d 133, 138 (6th Cir.), cert. denied, 513 U.S. 948, 115 S.Ct. 360, 130 L.Ed.2d 314 (1994)). Evidence that is "newly available" as opposed to "newly discovered" does not come within the ambit of the Rule and is not a sufficient basis upon which to grant a motion for a new trial. United States v. Turns, 198 F.3d 584, 586-88 (6th Cir. 2000), reh'g and suggestion for reh'g en banc denied (Feb. 25, 2000); Glover, 21 F.3d at 138-39. Rule 33 motions are disfavored and courts are instructed to grant them with caution. Turns, 198 F.3d at 586. The movant bears the burden of showing that a new trial should be granted. United States v. Seago, 930 F.2d 482, 488 (6th Cir. 1991).

Before turning to the merits of the motion, the court finds it necessary to briefly review the history of this case. Cornish was indicted on March 15, 2000 on charges of wire fraud, money laundering, bank fraud, and making a false statement on a loan application, in violation of federal law. He was convicted on all counts on February 8, 2001, after a trial at which he was represented by counsel, and is currently serving a sentence in federal prison. At the time of trial, the case had been pending for 11 months. Following his conviction, Cornish filed a pro se Rule 33 motion for a new trial based on newly discovered evidence. After permitting the defendant six months in which to produce the new evidence with no results, the district court denied the motion. In her order of denial entered August 3, 2001, District Judge Julia Gibbons noted that, even though the court was aware Cornish had received the documents he claimed were new evidence during the six-month period, he never supplemented his motion or provided them to the court. The defendant appealed both his conviction and the denial of the Rule 33 motion to the

Sixth Circuit Court of Appeals, which affirmed the lower court's decision in an opinion dated June 12, 2003. See United States v. Cornish, No. 01-6132, 2003 WL 21376949 (6th Cir. June 12, 2003). The second motion for a new trial currently before the court was filed November 2003.

With respect to the merits of the motion, the government points out in its response that the "new" evidence was known to the defendant at the time of trial and, therefore, cannot be considered "newly discovered". As previously noted, the Sixth Circuit distinguishes between evidence that is "newly discovered" and that which is "newly available". In Glover, the Court observed that

> **Glover is unable to establish that the evidence offered..."was discovered after the trial" and thus he fails to carry his burden of proof. Glover acknowledges that he was well aware of the [evidence] prior to trial... While the [evidence] may have been newly available, it was not in fact "newly discovered evidence" within the meaning of Rule 33.**

Glover, 21 F.3d at 138. "The key to deciding whether evidence is 'newly discovered' or only 'newly available' is to ascertain when the defendant found out about the information at issue." Turns, 198 F.3d at 587.

In support of his motion, the defendant avers that the evidence he now seeks to present consists of documents until recently in the possession of his civil counsel, Charles Dickinson, who died in 1997.[1]. He

---

1

According to Cornish, Dickinson represented him in a civil suit arising from the same facts as the instant criminal prosecution.

presents the affidavit of Rick Dickinson, Charles Dickinson's son, who states that after his father's death he removed several boxes of files from the elder's Memphis office and transferred them to his home in Nashville. Some of the boxes bore Cornish's name but the affiant's efforts to locate his father's client were unfruitful until February 2001, when Cornish's whereabouts became known to Dickinson through an investigator. Shortly thereafter, Dickinson shipped Cornish's records to him. It is the defendant's assertion, however, that because of prison transfers and various difficulties with prison personnel, he did not receive the boxes until May 2003.

In the cases reviewed by the court, the "newly available"/"newly discovered" dichotomy generally arises when co-defendants or other witnesses who refuse to testify at trial change their minds afterward, resulting in a motion for new trial. As the court stated in Turns, "[a] witness's shifting desire to testify truthfully does not make that witness's testimony 'newly discovered' evidence". Turns, 198 F.3d at 587. In the court's view, the evidence presented on the instant motion falls into the "newly available" category. That said, as the fact pattern in this case is somewhat unique, the court deems it prudent under the circumstances to consider the other factors. In doing so, the court finds that, even assuming the evidence was "newly discovered" and the defendant's efforts to locate it constituted due diligence, based on the following, a new trial is not warranted.

Count 1 - Wire Fraud.

With respect to Count 1, the Sixth Circuit held that:

> **Sufficient evidence was presented to establish wire fraud. Evidence is sufficient to sustain a conviction for wire**

> **fraud where the government establishes: 1) the existence of a scheme to defraud; 2) the use of wire communications to further the scheme; 3) the intent to deprive a victim of money or property; and 4) material deceit. The jury could properly conclude from the witnesses' testimony that Cornish, as owner of 6C/Dahcor Industries, had devised an elaborate scheme to defraud two companies, PFS and Fed Funds, of more than $313,000, and that Cornish used wire communications to further his scheme by faxing his application to sell an account receivable to PFS. The deceit was material because the fraudulent information induced Fed Funds to purchase the account receivable.**

Cornish, 2003 WL 21376949, at *1.

The defendant argues that evidence in the form of letters and meronda would have shown, had he been able to produce them, that one of the government's witnesses, Warren Rosen, was a liar. According to the evidence at trial, Rosen was the president of performance Financial Services(PFS), a firm that sold accounts receivable financing. Cornish, indicating that he owned a firm called 6C/Dahcor Industries, applied for financing from Rosen's firm in 1995, representing that he had an account receivable from an entity identified as ICFS Manufacturing Technologies for construction of a warehouse. The testimony revealed that Rosen made several requests for additional information and documentation, and corresponded with certain individuals connected with Manufacturing Technologies. Two of these individuals were Cynthia Snate, who told Rosen when he telephoned Manufacturing Technologies that she was the firms treasurer, and Al Townsend, the purported secretary of 6C/Dahcor. Rosen ordered a credit

report on Manufacturing Technologies, which revealed that information had been submitted to Dunn & Bradstreet showing an address for the business at 3595 Regal in Memphis with a telephone number that, according to the testimony of a BellSouth employee, rang at Cornish's home. In addition, William Scott Vaught, who conducted business as Great Southern Corporation at 3595 Regal in Memphis, offered testimony that he had been at that location since 1973; had never heard of Manufacturing Technologies, ICFS or 6C/Dahcor; and that no construction had occurred on the property. Cornish's wife, Aldith Snate Townsend Cornish, testified that her husband had requested she have a signature stamp prepared bearing the name "Al Townsend", whom she did not know, and that he had done business under the name Manufacturing Technologies in the past. After receiving documentation to support the application, Rosen's firm wired over $393,000 to Cornish's company in Memphis, which was never repaid despite numerous assurances by the defendant.

The movant contends that newly discovered evidence reveals Rosen falsely claimed to have received an award from the National Association of Minority Contractors; to have entered into a contract with the Department of Commerce to participate in minority business financing; and to have not been a "broker" when in fact he was. This evidence is of questionable relevance to say the least and, as Cornish himself avers, is offered solely for the purpose of impeaching Rosen's credibility. Thus, it cannot sustain a motion for new trial. See Dupree, 323 F.3d at 488 (holding that new evidence cannot be merely impeaching). Nor would it have likely produced an acquittal if the case were to be retried. See id.

The defendant makes a similar argument with respect to Willis Beale, another prosecution witness. Beale was president of Fed Funds, the company involved in the factoring of accounts receivable that funded the transaction set up by PFS culminating in the transfer of funds to Cornish. The defendant proffers evidence in the form of letters to show that Beale's trial testimony to the effect that his company was a "bank" or akin to a "bank" was a lie. Cornish also offers documentation to show that, although Beale testified he didn't know whether Rosen was a broker and that his relationship with Rosen's firm was at arms length, PFS and Fed Funds in fact shared the same address. As this evidence, like that presented with respect to Rosen, is for purposes of impeachment only, it does not support the granting of a new trial.

Cornish has also submitted copies of documents which he claims establish that certain documents used at trial had been altered. Specifically, he states that his Social Security number, which appeared under his signature in the original guaranty document, did not appear on the document used at trial. In addition, he submits that a handwritten disclosure he placed on the same agreement, on which 6C/Dahcor was listed as the debtor and the secured party as PFS, advising that he had known the firm Manufacturing Technologies for some time, had worked with them as an employee and representative in 1990, and was currently providing the company with "country presense"[sic] and in connection with that service had built a light assembly facility, was also missing from the document entered as an exhibit at trial. He argues this evidence supports his contentions that Rosen and Beale were liars. However, the defendant has failed to show, and the court cannot determine, in what way presentation of the documents in the form

posited by the defendant would have changed the outcome of the trial.

The defendant next attacks the testimony of Doris Austin, a government witness employed by the Memphis and Shelby County Construction Code Enforcement Division. She stated that her office issues construction licenses and permits and that it is not possible to do construction in the city or county absent a permit. According to her testimony, 6C/Dahcor could not undertake commercial construction as it held only a residential license and no permit was issued for ICFS or Manufacturing Technologies. She further related that the only commercial permit applied for by Cornish was for chines restaurants in business office buildings which he was not allowed to complete because he did not obtain the permit.

Cornish maintains that his contractor license renewal issued by the State of Tennessee, which was not in his possession at the time of trial, refutes Austin's testimony that her office issued construction licenses and permits. He also offers materials demonstrating that he in fact did perform commercial construction projects. To the extent the evidence is offered for the purposes of impeachment, a new trial based thereon is not warranted. Moreover, whether contractor licenses were issued by the state, local authorities, or both, and whether contractor licenses were issued by the state, local authorities, or both, and whether Cornish ever actually constructed other commercial buildings were not dispositive of the government's case and the court is unconvinced that the outcome of the trial would have been different had such evidence been presented.

Next, the defendant avers that newly discovered evidence consisting of time cards for government witness James Young both confirms Young's testimony that he was not the same person who signed punch list for Cornish's company and refutes his testimony that he was a construction foreman when in fact he was merely a construction helper. Young testified at trial that he was an employee of Cornish and that the only buildings built when he was construction foreman were two small sheds and that no warehouses were constructed. He further testified that he had never heard of Manufacturing Technologies. The evidence offered by the defendant as to Young is clearly cumulative and impeaching. In addition, there is nothing to suggest that evidence showing that this witness was a helper instead of a foreman would have resulted in Cornish's acquittal.

The defendant further points to documents in the possession of his former counsel indicating that the property upon which the building was supposedly constructed for Manufacturing Technologies was, unbeknownst to Cornish, an environmental Superfund site. The documents include a Commissioner's Order entered October 1991 by the State of Tennessee Department of Environmental and Conservation, Division of Superfund, in the matter of the City of Memphis and Shelby County, Respondents, along with the undated first page of an amendment to the Order and Cornish's application for a special use permit filed with the Memphis and Shelby County Office of Planning and Development on April 28, 1994. (Mot. For New Trial Based Upon Newly Discovered and Retrieved Evid. App1 at attachments 19, 20.) In his motion, Cornish sates that the Commissioner's Order "first came to [his] attention when the customer, [Manufacturing Technologies], notified him of a problem, and based upon that, Cornish

visited with the City Environmental Engineer at Memphis City Hall, and was reluctantly provided with a copy." (Mot. For New Trial Based Upon Newly Discovered and retrieved Evid. At pp. 18-19.) While the defendant does not advise the court of the date on which the notification occurred, the court may safely assume that, as Cornish is now incarcerated, it took place prior to his trial. What is abundantly clear is that, even taking as true the defendant's assertion that these documents are material, they are public records and could have been obtained prior to trial by Cornish's counsel had he deemed it necessary.

The defendant goes on to offer additional documents to show the building was in fact constructed; namely, (1) a contract for advisory services between Manufacturing technologies and Bancex FASG dated October 1994: (2) a construction proposal of 6C/Dahcor Industries, Inc. to Manufacturing Technologies dated November 1994; and (3) a delivery ticket from a concrete supplier that is largely illegible. Cornish has failed, however, to explain to the Court why these documents could not have been obtained before trial or how they are material and exculpatory.

COUNT 9-Bank Fraud.

In its opinion, the Sixth Circuit found that

> **[t]he government presented sufficient evidence to prove all the necessary elements of bank fraud. To convict Cornish of bank fraud, the government had to prove that: 1) the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; 2) the defendant did so with the intent to defraud; 3) the financial**

> **institution was insured by the FDIC; and 4) the deceit informing the scheme to defraud was material. Bank officials from First American National Bank ("First American"), now known as AmSouth Bank, testified that a check from Cagle's Farms, Incorporated, made payable to the Bunge Corporation for $113,896.39 was deposited into Cornish's Dahcor bank account. Cornish's knowledge and intent was indicated by alterations on the check, the deposit of the check, and the simultaneous deposit of a money order made out to Bunge/Dahcor. A bank official testified that the bank was FDIC insured. Finally, the alterations and the money order deposit were material to the fraud because the teller otherwise might not have accepted the check for deposit.**

Cornish, 2003 WL 21376949m at *2. With respect to Count 9, the government presented testimony at trial that Cage Farms, a Dalton, Georgia poultry company, sent a check to Bunge Corporation in payment for seed. The check was mailed to Post Office Box 30667 in Memphis, Tennessee. When the check, written in the amount of $113,896.39, was not received, an inquiry revealed that the check had been endorsed by a "Bance Corporation." An investigator for AmSouth Bank testified that the check had been deposited in 6C/Dahcor Industries account on October 27, 1998. On the same day, a personal money order from Union Planters for $28.96 payable to Bunge/Dahcor Industries was also deposited in the Dahcor checking account.

Carolyn Bell Smith, a records custodian for the United States Postal Service, testified that box 30667 was owned by Bunge Corporation. Another box in the

same postal facility, numbered 30727, was opened in 1997 by Cornish in the name of Bancex. The two boxes were in close physical proximity and, in her opinion, mail for Bunge could have been accidentally dropped into Bancex's box.

Special Agent Brian Burns offered testimony that he interviewed Cornish about the check in April 1999, recalling that the defendant acknowledged that he had cashed the check and the money order and that he was not due any funds from Cagle Farms. Burns further stated that Cornish opened the post office box for Bancex on the same day the deposit was made and that there was no Bancex Corporation affiliated with Cornish registered with the Secretary of State.

The defendant seeks to present a Postal Service Application and Voucher for Refund of Postage and Fees dated May 5, 1992 to show that he in fact had been "affiliated" with the post office box since at least 1992, rather than 1997. He also submits copies of numerous bills and letters dated from 1987 to 1996 addressed to his company, Banc-Ex, Finally, Cornish offers a copy of his credit report indicating the post office box had been his address since 1982. These documents, Cornish argues, support his testimony that he had maintained the box since around 1984 and prove Burns and Smith lied about when the box was obtained by Cornish. While there may have been some inconsistency in testimony on this point, it is immaterial as the crime for which Cornish was convicted was, in essence, the deposit into his account of a check not belonging to him. How long he had the post office box from which he may have obtained the check is of no consequence.

The defendant insists that his deposit of the check into his account was "an unfortunate confluence of circumstances." He argues that he was expecting a check in a similar amount from a company named "Cage Farms" and that the company name "Bunge" is similar to the name of one of his Jamaican-based companies which is part of his "Bance" group. Cornish claims he told Burns to look into the offshore accounts to see how the error could have occurred but the special agent never followed up. According to the defendant, one of the document retrieved from Dickinson's files contains a list of authorized signatures and depositors from Bancex International (Jamaica) Limited's financial institution in Kingston. The documents lists the company and its operating subsidiaries, which are known collectively as Bance. The defendant asserts that, had he been permitted to introduce the document at trial, which listed companies with names such as Baungi, Banceb, Baungr, Baumta, Bancegu, Bancett, Bancedm, Bancea, Bancels, Baceva and Bancear, the trier of fact could have appreciated how easily a mistake such as the one he describes could have occurred. While the document, which appears on a Mutual Security Bank Limited, Jamaica form, is not dated, it does bear a handwritten notation on its face with the date "12/95". Cornish has offered no explanation whatsoever as to why the document, which was obviously in the possession of his banker, could not have been obtained for use at trial. Moreover, considering the volume of evidence presented in this case, it is highly unlikely that this one piece of evidence would have convinced a jury that he was not guilty of the offense of bank fraud.

Count 10 - False Statement.

According to the Sixth Circuit,

> **[s]ufficient evidence existed to support Cornish's conviction for making a false statement to a bank on a loan application. Evidence is sufficient to sustain a conviction for making a false statement to a bank where the government establishes that: 1) the lending institution's deposits are federally insured; 2) the defendant made false statements to the institution; 3) the defendant knew the statements were false; and 4) the statements were made for the purpose of influencing the institutions' action upon an "application, advance,..... commitment, or loan."..... The jury could properly conclude from the witnesses' testimony thatCornish, as chief operating officer of Oralcor, Incorporated, applied For a business loan from First American, the bank was federally insured, Cornish falsely stated on the application that AIP, Random Fastners, and Alco, Incorporated, owed him amounts approximately$484,000, $289,000, and $206,000, respectively, and the statements were made to influence the bank's decision on the loan.**

Cornish, 203 WL 21376949, at *2. At trial, William Freeman, branch manager of AmSouth Bank, formerly First American Bank, testified that Cornish submitted a loan application dated October 2, 1995, in which nthe defendant represented that he and his company, Oralcor, Incorporated, had annual sales of between one million and one-and-a-half million dollars; that the company held total assets in the amount of two-and-a-half million dollars; and that Cornish had $400,000 in accounts receivable. The defendant further advised the lender that

he had $1,300,000 in construction in progress and various recently completed construction projects for which he had not yet received payment, including $484,000 from AIP; $289,000 from Random Fastners; $206,000 from Alco, Incorporated, as well as others.

In the instant motion, Cornish seeks to introduce as evidence a mechanics and materialmen's lien for Alcor, Incorporated dated may 10, 1994, as well as subcontractor invoicing documents from commercial roofers, refrigeration contractors and others who worked on the Alcor project. He argues that, now the contractors have been identified, they can be called to testify. He makes similar arguments with respect to the other projects referred to with respect to the application. The defendant does not, however, offer any explanation of how he could not have come by this information at the time of trial. The remainder of the defendant's assertions with regard to Count 10 will not be considered, as they consist simply of rehashing of Cornish's defense to the charge. Nor will the Court accept the defendant's invitation to revisit previous decisions of this court and the Sixth Circuit in this case.

For the reasons articulated herein, the motion is DENIED. In addition, the remaining pending motions in this case, all of which relate to the instant motion, are also DENIED.

IT IS SO ORDERED this 1st day of July, 2004.

/S/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

FILED
OCT 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-399

In The

Supreme Court of the United States

O'RANE M. CORNISH, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENT

O'Rane M. Cornish, SR.
Petitioner
Represents Himself
3804 Shady Hollow Lane
Memphis, TN 38116-4039.

October 19, 2006

QUESTIONS PRESENTED

QUESTION 1:

Whether the unavailable 'municipal building permitting' documentary evidence, the only recognized objective, positive proof within the local municipality, of: (a) The construction and existence of any building; and (b) The existence of building construction projects; both pivotal, dispositive issues in this case, qualifies under the aegis of Rule 33 Newly Discovered evidence, given the uniquely peculiar, distinguishing circumstances and fact pattern of the Case.

QUESTION 2:

Whether as to the same case and same issue, (a) The District Court's Order overruling the previous decision of the Appellate Court, followed by, (b) The Appellate Court's decision affirming the District Court's Order; constitute violations of the settled doctrines of: (1) "The Law of the Case"; and (2) "The Law of the Circuit"; and "The Mandate Rules"; and longstanding concepts of precedent; and so raises question of reasonableness and fairness in general, and on the whole, evidences a violation of the Due Process Clause of the U.S. Constitution.

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SUPPLEMENT

At the time of Cornish's initial filing of his petition, he was confined at FCI-Oakdale with the usual limitations of access to informational, legal and his trial records and documents. Indeed, while at Oakdale, the limited amount of records he had access to was the result of the protective Order issued December 14, 2004 by the United States District Court, Eastern District of Texas at Texarkana, Texas. He was released on April 21, 2006 and so he now has virtually full access to all information, record, documents, files and legal technical assistance, including ongoing effort to retain competent appellate counsel.

Given all of this, he now supplements his Petition, to bring to the Court's attention with specificity he could not achieve before, trial and legal information to which he now has full access, and the dramatic impact of the of the "newly available documents" along side the testimony.

First, the specific trial testimony of the "single expert authority witness", Doris Lee Austin, "Austin" Deputy Administrator, Memphis & Shelby County Office of Construction Code Enforcement, (CCE), with a comparative summary analysis of the "newly available municipal building permitting documents" at issue and which are graphically displayed at Appendix C to his Petition.

Austin's testimony appears in the record as Reporter's Transcript (RT), Volume I, page 151, Line 1 through page 159, Line 5. [TR. Vol. 1p151:L1-p159:L5]. It is committed to this Court's reading. This presentation is configured as alternate Austin trial testimony followed by brief summary analysis.

Austin on Direct, Rt. Vol.Ip151:L1-10.
Q: Ma'am, would you please state your full name?
A: Doris Lee Austin.

Q: And, Ms. Austin, what is your occupation?
A: I'm Deputy Administrator of Memphis and Shelby County Construction Code Enforcement.
Summary Analysis :

Beyond this Austin testimony, nothing else to which she testified is credibly. In other words, when compared with the "newly available municipal building permitting documents" she is plainly shown to have testified falsely, mistakenly, confusingly to Cornish's detriment and severe prejudice.

Austin Direct cont'd TR. Vol. I: p151:L11-18
Q: And can you tell us essentially what the deputy administrator does of that Agency?
A: It's the day-to-day operation of code enforcement including ..... issuing.... permits, license, ...
Q: And your office issues construction licenses, permits, and also inspects properties?
A: That's correct.
Summary Analysis:

Austin's Falsity 1: Neither she or her office issues contractor's "license" in the State of Tennessee. The State issues such licenses via its Board for Licensing Contractor's at Nashville, Tennessee.

Austin's Direct cont'd. TR. Vol. I: p152:L14-p153:L3:
Q: Are you familiar with Mr. O'Rane Cornish?
A: With the company, yes.
Q: What is the company that he's associated with?
A: He has what we call a B, C and A license which is building construction, residential.
Q: Residential?
A: Residential.
Q: What is the company name that he has that license under?

A: 6C/Dahcor Corporation.
Q: Under that license, can 6C/Dahcor undertake any commercial building?
A: No, sir.
Q: Only residential?
A: Yes, sir.
Summary Analysis:

This testimony is not merely incredible, it is false as to its premise and theory, and for good measure, is directly contradicted by the 'newly available municipal building permitting documents' at App. C. According to her testimony, she is familiar with Cornish's company and that he could only do residential construction under a "license" that she earlier falsely testified that she issued". It is notable that she did not know the name in which his license was issued. This court is now directed to App. C, the municipal building permitting documents displayed at App. 12, 13 and 14.They are commercial applications, permits, inspection report and Certificates of Occupancy. They also show his company's name in which his license is listed. They singly and cumulatively contradict her testimony in its entirety.

CONTRADICTION 1: The "newly available document" at Appx. C, App. 12, fig. 1.1 is a commercial permit B0737678 for 4791 Tchulahoma Road, **issued** by Austin's office. It shows checked off with an "**x**", Business, which is commercial — as opposed to residential. It is a direct contradiction of her testimony at p.152:L14-p.153: L3.

CONTRADICTION 2: The "newly available document" at Appx. C, App 12, fig. 1.2 is the commercial permit application 737678 for 4791 Tchulahoma Road, **submitted** by Cornish to Austin's office. It shows checked off with an "x", Business, which, as noted above is commercial

— as opposed to residential. It directly contradicts her testimony at p. 152:L15-p.153:L3.

CONTRADICTION 3: The "newly available document" at Appx. C, App. 12, fig. 1.3 is also the commercial buidling permitting document for 4791-7 Tchulahoma Road, **submitted** by Cornish to Austin's office. It shows checked off with an "x", Business, which, as above noted is commercial — as opposed to residential. It directly contradicts her testimony at p. 152:L14-p153:L3.

CONTRADICTION 4: The "newly available document" at Appx. C, App. 12, fig. 1.4 is the commercial building permitting document for 4730 Tchulahoma Road, **issued** by Austin's office. It shows checked off with an "x", Business, which as earlier noted is commercial — as opposed to residential. It directly contradicts her testimony at p. 152:L14-p153:L3.

CONTRADICTION 5: The "newly available document" at Appx. C, App. 12, fig. 1.5, is the commercial building permitting document for 4730 Tchulahoma Road, **submitted** by Cornish to Austin's office. It shows in writing "Business office" under "Business Use", and again at "Use of Bldg.", which indicates commercial as opposed to residential. It directly contradicts her testimony at p. 152: L14-p153:L3.

CONTRADICTION 6: The "newly available document" at Appx. C, App. 14, fig. 2.1, is the commercial building permitting document B0737688, **issued** by Austin's office, for 'a restaurant named "Chitlin-N-Thangs". It shows checked off with an "x" Business, and at Use of Bldg, "Office". It is therefore commercial. It directly contradicts her testimony at p. 152:L14-p153:L3.

CONTRADICTION 7: The "newly available document" at Appx. C, App 14, fig. 2.3, is the commercial building Certificate of Occupancy B0737688, for the restaurant named "Chitlin-N-Thangs", issued by Austin's office. It shows business [BUO]. It is commercial. It directly contradicts her testimony at p. 152:L14-p153:L3. This document is issued only when a contractor successfully completes the building project for which he pulled the permit.

CONTRADICTION 8: The "newly available documents at Appx. C, App 15, fig. 3.1, is the commercial building permitting document 725309 for 3383 Park Avenue, PCD, **submitted** to Austin's office. It shows checked, "business". It is commercial. It directly contradicts her testimony at p. 152:L14-p153:L3.

CONTRADICTION 9: The "newly available building permitting document at Appx. C, App 15, fig. 3.2, is the commercial building permitting document B0725307 for 3383 Park Avenue, PCD, **issued** by Austin's office. It is business which as noted is commercial. It directly contradicts her testimony at p. 152:L14-p153:L3.

CONTRADICTION 10: The "newly available document" at Appx. C, App 15, fig 3.4, is the commercial building Certificate of Occupancy B0725309, for 3383 Park Avenue, Personal & Career Development [PCD], **issued** by Austin's office. It shows business [BUO]. It is commercial. It directly contradicts her testimony at p. 152:L15–p153: L3. This document is only issued when the contractor successfully completes the building project for which he pulled the permit.

In sum, the foregoing ten highlighted newly available municipal documents contradicts and disproves Austin's testimony that Cornish and his Company could do only residential construction.

Austin's Direct cont'd. TR. Vol.Ip153:L17-21.
Q: Does the name Manufacturing Technologies....appear in your records as any company for which a permit was taken out or an inspection given for commercial permit of building
A: No, sir.
Summary Analysis:

The "newly available municipal building document" 73767, at Appx. C, App12, fig 1.3, shows at Owner/Tenant "Mfg [Manufacturing] Technologies, and class of work, "new" is circled. Again, Austin's testimony is contradicted by the documentary evidence.

Austin's Direct cont'd TR. Vol. Ip153:L22-24; p154:L9-18.
Q: Has Mr. Cornish applied for some commercial permits?
A: Yes, sir.
....
Q: Was he allowed to in fact complete those because of his license?
A: No.
Q: So of the four commercial permits he applied for, he was not allowed to complete any of them; is that correct?
A: No.
Q: And Manufacturing Technologies was not any of those?
A: No, sir.
Summary Analysis:

The "newly available municipal building documents" at Appx. C, App. 14, fig. 2.3 and at App 15, fig 3.3, as noted earlier, are the Certificates of Occupancy for the very

projects she said Cornish was never allowed to complete. The Certificates are issued only after the contractor who pulled the building permit, successfully completes the construction as determined by a final inspection performed by a building inspector from Austin's office. In effect, if Cornish did not successfully complete the project, the Certificate of Occupancy displayed at App 14 and 15 would never have been issued. These documents, Figs. 1.1, 1.2, 1.3, Figs. 2.3 and 3.4, directly contradict Austin's testimony.

Austin on Cross Examination: RT. Vol.Ip154:L22-p157:L7.

Here, not only did Austin continue her false testimony, but it was also confused.

Austin on Cross at RT. Vol.Ip155:L11-20:

Q: ....Now to your knowledge, you didn't know anything about him doing a commercial building on Tchulahoma Road, did you?

A: Yes, I do.

Q: You know that that building was built?

A: I have records of a building on Tchulahoma Road, yes, ma'am.

Q: You have records of a 22,000 square foot building on Tchulahoma Road?

A: I went by the address. I can't tell you the specifics without looking at the permits.

Summary Analysis:

Here, Austin testified that she had records... of a 22,000 square foot building on Tchulahoma Road. That she went by the address and by implications saw the building. But, according to her testimony, she could not be specific. She didn't bring the building permitting documents [e.g . those displayed at Appx. C, App 12, 13, 14 and 15]. But look at her further testimony.

Austin on Cross RT.Vol.Ip156:L7-15:
Q: Was this a huge building?
A: I don't know. I have never been out there.
Q: I thought you said you went by there?
A: No, no.
Q: So you never went by and saw the building actually?
A: No.
Summary Analysis:

Austin testified confusingly. First, she testified that she went by the building address. Then, pressed for specifics, she testified that she never went out there; and she denied what she earlier testified that she did.

Austin testified falsely on direct. She testified falsely and confusingly on cross examination. And, in any event, she is wholly contradicted by the "newly available municipal building permitting documents" in the absence of which she testified. Her testimony on Redirect examination was not much better, indeed it got worse because her testimony became deliberately misleading with prosecutorial plodding.

Austin on Redirect RT.Vol.Ip157:L13-21.
Q: Ma'am, that address was 4370 Tchulahoma Road, wasn't it?
A: Uh-huh.
Summary Analysis:

That is false. 4370 Tchulahoma is not an address at issue, and possessed no relevance to the case. Yet, the address is further reinforced into the minds of the jury that it is the relevant address at issue.

Austin on Redirect cont'd, RT. Vol.Ip157:L19-20
Q: That's what we're talking about, 4370 Tchulahoma Road.

Summary Analysis:

The false information charge against Cornish pertains to the accuracy of this testimony. The address at issue, is 4730 Tchulahoma and NOT 4370 as the jury was informed by her testimony and the prosecution's testimonial phraseology. The "newly available building permitting documents" at Appx. C, App 12, fig. 1.4, 1.5, contradicts the entire testimony on redirect. The Court and the jury were left totally confused, so much so, it called for a sidebar conference. The colloquy is telling:

COLLOQUY, RT. Vol. Ip157L23-p158:L17

THE COURT: Can you all come up here just a minute?

THE COURT: .....

Mr. DiSCENZA: That address is.... we're going to prove absolutely where 4370 Tchulahoma Road was.

THE COURT: So I don't need to worry about the fact that the jury is at this point is undoubtedly confused?

Mr. DiSCENZA: No.

THE COURT: All right. I just wanted to make sure.

Mr. DiSCENZA: Not at all

THE COURT: I just wanted to make sure there was going to be something else on this subject....I didn't want the jury left wondering whether somebody went out and looked at some site.

Mr. DiSCENZA: We're going to prove that.

Summary Analysis:

The record shows his promise to be hollow and unkept. Someone went out there. App 13. As the "newly available municipal permitting documentary evidence" shows, the prosecution, with the false, confused and misleading testimony of its only expert authority witness, Austin, could not prove where the 4370 Tchulahoma address was, because, not only was that address not relevant to the case against Cornish, in reality, it does not exist.

The foregoing constitute the testimony of Doris

Austin, the prosecution's ace witness — indeed, the only witness relied on to carry its burden that Cornish misrepresented his construction, and the existence of the building at issue at a time and place as represented on the form to the factor; and the existence of the 4730 Tchulahoma Road, Alcor construction project.

Austin testified in the absence of her very own Code Enforcement documents. They were not available at trial, but were located thereafter and are now before the Court as "newly available".

But for the absence of these now 'newly available building permitting documents" the outcome at trial would have been quite different, especially as to Counts 1, (2-8) and 10. United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985). The probability of a different result is sufficient to undermine confidence in the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). It must not be overlooked that due process is fully involved here.

Finally, the prosecution did not present an overall strong case. After all, it relied upon only Austin of Code Enforcement to carry its burden.

The record reveals that Cornish presented three eyewitnesses to the Construction: (1) Leavette Robinson, a commercial plumber, who testified that he lived across the Street (Tchulahoma Road) from the construction site, and saw Cornish's construction of the building, day to day, from start to finish, and that he himself visited it up close at completion.RT.Vol.IIp269:L6-22. (2) Antonio Robinson, operator of his own construction material hauling business, who testified that he remembered hauling materials (sand) to the site of the construction, and recall witnessing the construction and existence of the building at issue. RT. Vol. Ip273:L19-p274:L16. He testified that "it was built real nice". Rt. Vol.Ip275:L16-18. And (3) Mrs. Aldith S. Cornish,

deceased spouse of Cornish, who testified that she saw "he [Cornish] place a brand new buildin{ on the empty lot beside the church". Rt. Vol.Ip282:L7-9. And (4) Cornish himself who testified at Rt. Vol.Ip301:L6-8, that in late 1994 and 1995 he constructed the building at issue. But, he did not have his documentary records, they couldn't be found. As a result, Doris Austin, Deputy Administrator, carried the day. Her testimony overwhelmed the testimony of all four of his witnesses. The "newly available municipal building permitting documents" reveal that she testified falsely in there absence. More likely than not, these documents would have resulted in a different outcome at trial. They are proof of what they state. United States v. McCoy, 193 US 543, 24 S.Ct. 528, 48 L.Ed.805.

The silence of Rule 33 as to "newly available evidence" being the basis for new trial; the confusion within and among the Circuits as to same; and the lack of, to this point, guidance from this Court as to 'a standard' to accommodate the circumstances here presented; should not now be allowed to cause a conviction to rest on the instant cases's pervasive, testimonial evidentiary falsities brought forth by the "newly available municipal building permitting documents" above highlighted and described. Review this case and set the guidance as requested by Cornish in his petition.

Respectfully submitted,

O'Rane M. Cornish, Sr.,
Represents Himself.